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June 14

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Cases*

DETERMINED IN THE

FIRST DEPARTMENT

AT

GENERAL TERM,

March, 1875.

AARON HARRIS, PLAINTIFF IN ERROR, v. THE PEOPLE OF
THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

Metropolitan Fire Marshal — investigation by, as to origin of fires — Chap. 563, Laws of 1868 — Same felony may be charged in different counts of an indictment — Variance — when not fatal.

Chapter 563, Laws of 1868, creating the office of metropolitan fire marshal, giving him power to administer oaths, and providing that false swearing in any matter or proceeding before him should be deemed perjury, and be punishable as such, has not been repealed by the subsequent statutes in relation to such officer.

The plaintiff in error was convicted of perjury, committed by him in the course of his examination before the fire marshal of the city of New York. The indictment contained two counts, one alleging perjury in the oral testimony given before the fire marshal, and the other alleging perjury in swearing to an affidavit before that officer, containing, in substance, the same allegations. *Held*, that the indictment was good. Though different felonies cannot be charged in different counts, yet the same felony may be charged in different ways in different counts, to meet the facts of the case.

The second count of the indictment charged the plaintiff in error with having sworn falsely in his affidavit, "of and concerning several necessary and material matters contained therein, in substance and to the effect following, that is to say," etc. The affidavit set out in the indictment stated that there were on the premises 60,000 cigars, while the affidavit produced upon the trial stated that there were 65,000 thereon. *Held*, that the variance was not fatal; that where an oath is set out "in substance and to the effect following," a literal copy is not required.

People v. Warner (5 Wend., 271) followed.

* The other opinions of this term are contained in the preceding volume.

Upon an inquiry by the fire marshal into the origin and cause of a fire, where suspicion exists against the witness, who was the owner of the property, such owner's assertion as to the value of the property contained in the premises at the time, is a proper subject of investigation.

WRIT of error to the Court of General Sessions of the city and county of New York, to review the conviction of the plaintiff in error of perjury.

Benjamin K. Phelps, for the defendants in error.

Ira Shafer, for the plaintiff in error. The verdict is repugnant, inconsistent and void. The jury say that he is not guilty of the offense described in the first count, but is guilty of the one described in the second, and both counts describe in the same language, the same identical offense. (Barb. Cr. Law, 367; 1 Chit. Cr. Law, 690; 2 Hawk., 47, § 8; *O'Connell v. The Queen*, 11 Clark & Fin., 155; *Hayworth v. State*, 14 Ind., 590; *State v. McCue*, 39 Mo., 112; *People v. Ah Ye*, 31 Cal., 951; *Guenther v. The People*, 24 N. Y., 100; *State v. Lorumbo*, Harper [Va.], 183; *Allen v. Aldrich*, 9 Foster [N. H.], 163; *Jewett v. Davis*, 6 N. H., 518; *Holman v. Kingsbury*, 9 id., 109; *Coffin v. Jones*, 11 Rich., 95; *Brunswick v. McKean*, 4 Greenl., 508.)

BRADY, J. :

The plaintiff in error was convicted of perjury, at the December term of the General Sessions, 1873, and sentenced to ten years' imprisonment in the State prison. The perjury alleged in the indictment, was committed on the 13th day of September, 1873, before George H. Sheldon, fire marshal of the city of New York, who was investigating the cause, origin and circumstances of a fire which occurred on the 5th of September, 1873, at No. 10 Hester street, in a building occupied by the plaintiff in error and his copartner, as a tobacco manufactory. This investigation was entered upon by the fire marshal, in pursuance of the duty and authority imposed upon him by chapter 563, of the Laws of 1868, and the several acts supplementary thereto. The plaintiff in error swore, on this examination, that, at the time of the fire, he was not in the city of New York, but was in the city of Troy. He also swore, that, at the time of the fire, there was in the building in

which the fire occurred, a stock belonging to him and his copartner, consisting of 65,000 cigars, 185,000 cigarettes, 400 pounds of Havana tobacco, of the value of one dollar and fifty cents per pound, 645 pounds of Virginia tobacco, of the value of sixty-five cents per pound; and that he and his partner sustained a loss by the fire, of between five and six thousand dollars.

The indictment contains two counts, one alleging perjury in the oral testimony given before the fire marshal, and the other alleging perjury in swearing to an affidavit before the same officer, containing in substance the same allegations. The plaintiff in error was convicted upon the second count of the indictment. On the trial, evidence was given in relation to the merchandise upon the premises, on behalf of the people. It is claimed by the people that the evidence shows that the fire was designed, and for the purpose of making a false claim against the insurance company, although that is not important in regard to the accusation of which the plaintiff in error was convicted. The first objection taken on the trial, was to any testimony being given in support of the indictment, on the ground that the act of May 4th, 1868,* creating the office of metropolitan fire marshal, giving him power to administer oaths, and condemning false swearing in any proceeding before him, had been repealed. This objection is not tenable.

1. The act of May 4, 1868,† has not been repealed. The Revised Statutes gave to the chief of police the authority to investigate the origin of fires.‡ The act of May 4, 1868, created the office of metropolitan fire marshal, and made it his duty § to "examine into the cause, circumstances and origin of fires (occurring in those portions of the metropolitan police district in which regular patrolmen of metropolitan police are authorized and appointed), by which any building, vessels, vehicles, or valuable personal property shall be accidentally or unlawfully burned, destroyed, lost or damaged, wholly or partially; and to especially inquire and examine whether the fire was the result of carelessness or the act of an incendiary. The metropolitan fire marshal shall take the testimony on oath, of all persons supposed to be cognizant of any facts, or to have means of knowledge in relation to the matters

* Laws 1868, chap. 563, p. 1168, vol. 2.

† 2 Rev. Stat. (5th ed.), 990.

‡ *Supra.*

§ Sec. 2.

herein required to be examined and inquired into, and cause the same to be reduced to writing," etc.

The third section of the act gives him "power to issue a notice, in the nature of a subpoena * * * to compel the attendance of any person as a witness before him, to testify in relation to any matter which is, by the provisions of this act, a subject of inquiry and investigation by the said marshal;" "to administer and verify oaths and affirmations to persons appearing as witnesses before him; and false swearing, in any matter or proceeding aforesaid, shall be deemed perjury, and shall be punishable as such."

This act was followed by the act of April 26, 1870, * which was amendatory of an act passed in the same year, † and is as follows: "Section 44. * * * The board of police shall have power to appoint a fire marshal, chief clerk, and assistant clerk, who shall hold office during the pleasure of the board, and such board, marshal, and clerks, shall have the like powers, and perform the like duties, as those provided by chapter 563, of the Laws of 1868, so far as they are applicable to the city of New York; and the compensation of such marshal and clerks shall be the same as now fixed in and by said acts." ‡

The charter of 1873, § gave the appointment of the fire marshal to the fire commissioners, but conferred upon the marshal | all the powers, and imposed upon him all the duties, given and imposed by the previous statutes relating to that office.

The act of 1871 ¶ did not, in any way, limit the powers and duties of the marshal. By section 4, it invested him with the same powers conferred by the act of 1868, ** and also the same powers conferred upon the superintendent of police of the city of New York, by the Revised Statutes. The marshal, by these acts, was authorized to examine into the cause, circumstances and origin of fires, by which any building, vessels, vehicles, or any valuable personal property should be accidentally or purposely destroyed, lost or damaged, wholly or partially; and especially to take the testimony on oath of all persons supposed to be cognizant of any facts, or to have means of knowledge in relation to the matters

* Chap. 383.

† Chap. 137, § 44.

‡ Sec. 21.

§ Laws 1873, p. 504.

| Sec. 76.

¶ Laws, p. 1277, chap. 584.

** *Supra*.

therein required to be examined and inquired into; also to compel the attendance of witnesses, and to administer oaths and affirmations to persons appearing as witnesses before him. It is very clear, therefore, that, for any false swearing as to any matter legitimately within the sphere of the marshal's powers, an indictment may be had, and a conviction secured on competent evidence. The further objection, that there was no legal proof that the witness, Mr. Sheldon the fire marshal, was the officer referred to in the indictment, is equally unavailable. He testified, without objection, that he was then, and had been fire marshal from the twenty-first of May preceding his examination; and on cross-examination stated by whom appointed, and the manner of his appointment.

The indictment, as already suggested, was predicated of the oral testimony of the plaintiff in error, and his affidavit signed by him and sworn to before the fire marshal. Two counts were employed to develop both phases of the offense. It is, perhaps, unnecessary to cite authorities to show this to be an authorized mode of pleading. It may be said, however, that though a defendant cannot be charged with different felonies in different counts, yet he may be charged with the *same felony*, in different ways, in several counts, to meet the facts of the case.* The offense herein was precisely the same, but charged in different ways. The plaintiff in error was charged with having sworn falsely in his affidavit, of and concerning several necessary and material matters contained therein, "in substance and effect following, that is to say," etc. One of the matters stated, as alleged, was that there were on the premises 60,000 cigars; whereas, by the affidavit, when it was produced, the statement made was, that there were 65,000 cigars; and in this respect there was a variance between the proof and the charge. The plaintiff in error urges this as a fatal error; but he is mistaken. When the oath is set out "in substance and to the effect following," a literal copy is not required. It is not necessary to set forth the affidavit, etc., on which perjury is assigned verbatim. †

"To my apprehension," said MARCY, J., "the substance and effect of an instrument in writing cannot, either in common parlance or legal import, be understood to mean an exact copy of it." No apprehension could be reasonably entertained, that the plaintiff in

* Barbour's Cr. Pr., §40, and cases cited. † The People v. Warner, 5 Wend., 271.

error, being convicted of the offense charged upon the paper, could be convicted a second time for the same offense. The variance is clearly a clerical error.

These views dispose of the objections to the authority of the fire marshal, to the admissibility of the affidavit on account of the alleged variance, and to the legality of the conviction under one of the counts. There remains to be considered, however, the propriety of investigating the question, as to the value of the property as stated in the affidavit, to which objection was made, and of which it seems to have been claimed perjury could not be assigned. It is true that the value of the property, in the abstract, is not at all material to the question of how the fire originated, but when the inquiry is extended, and the examination embraces not only that subject but another, namely, whether it was the result of carelessness or the act of an incendiary, it may become material to know whether any misrepresentation has been made in reference to the property assumed or said to be destroyed, and, if yea, whether it furnished a motive which might influence one to become an incendiary, whoever he might be. The complaint against the plaintiff in error was two fold: that he had sworn he was absent from this city when the fire took place, when he was not in fact absent; and, secondly, that he had falsely augmented the value of the property on his premises at the time of the fire. In seeking the origin and circumstances of the fire, and with a suspicion against the plaintiff in error, his asserted value of the property, if enhanced beyond its true value, was an important and material element, and one necessarily embraced legitimately within the inquiry established. It was not erroneous, therefore, either to admit the evidence on the question of value, or submit the issue created by it to the jury. The testimony in reference to the absence of the plaintiff in error from the city, was strong on his behalf, it would seem from the appeal book, but we cannot say that it was sufficient to overcome the testimony given on behalf of the people. The design of the statute, in creating a fire marshal, and investing him with broad and ample powers, was to detect and punish the crime of arson, which, without that officer, might not be discovered; and, therefore, the legislature made false swearing before him perjury, if it related to any subject legally within his authority. The facts and circumstances

which would tend to show the act of firing, might in many instances become valuable in demonstrating the perjury committed, particularly those bearing on the existence of motive, which is always coupled with design.

The judgment must be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

FRANCIS LELAND, SURVIVING EXECUTOR, ETC., OF PHILETUS PHILIPS, DECEASED, RESPONDENT, v. JOSEPH MANNING, APPELLANT.

4h 7
89 Mis*225

Promissory note given to one executor — in action upon by executors, indorsement of to them need not be alleged — Letters testamentary to foreign executors — Duty of executors as to settlement of debts — Inventory — when filing of, need not be alleged — Evidence.

In an action brought by two executors upon a promissory note, given to one in settlement of a debt due from the maker to the estate of the decedent, it is not necessary to allege that the note was indorsed to them.

Where letters of administration are granted by the surrogate to foreign executors, it is not necessary, in an action brought by them, to allege the probate of the will in the foreign country, or in this State.

An executor is bound to compound and release a debt if the interest of the estate requires it; he is obliged to act as a discreet and prudent man would, were the debt his own. Where a note is taken, as the result of a settlement and compromise, the anterior matters are merged in it, and an action should be brought upon the note, and not upon the prior indebtedness.

In an action brought upon a note given in settlement of claims due to the plaintiff's testator, the pleadings in the suits between the parties, which culminated in the making of the note, are competent evidence to show that the note was given for a valuable consideration, and for the benefit of the estate.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

Milton A. Goodenough, one of the executors of Philetus Philips,

 FIRST DEPARTMENT, MARCH TERM, 1875.

deceased, was one of the original parties plaintiff in this action, and died after the entry of judgment.

Jesse K. Furlong, for the appellant. If any cause of action appears by the terms of the complaint, it is one solely in favor of Goodenough personally against the defendant. (*Beach v. Gallup*, 2 Code R., 66; *Taylor v. Corbierre*, 8 How. Pr., 385; *Parker v. Totten*, 10 id., 233.) The note in suit having been made to Milton A. Goodenough, or to his order, its indorsement to the plaintiff should have been alleged. (*Marshall v. Rockwood*, 12 How. Pr., 452; *Lord v. Chesebrough*, 4 Sandf., 697; and see *James v. Chambers*, 2 Seld., 209; *McKnight v. Hunt*, 3 Duer, 615; and see *Metropolitan Bank v. Lord*, 1 Abb. Pr., 185; *Vanderpoel v. Tarbox*, 7 N. Y. Legal Obs., 150; *White v. Brown*, 14 How. Pr., 282; *Edwards on Bills*, 250; *Parker v. Totten*, 10 How. Pr. 232; *Prindle v. Carruthers*, id., 33; *Thomas v. Desmond*, 12 id., 321.) The disclosures to Denison were not privileged. (*Whiting v. Barney*, 30 N. Y., 342, opinion of INGRAHAM, J.; *Griffith v. Davis*, 3 Barn. & Ald., 502; *Shore v. Bedford*, 5 Man. & Gran., 271; *Weeks v. Bryant*, 16 Mees. & Wels., 816; *Coveney v. Tannahill*, 1 Hill, 33, 40; *Robson v. Kemp*, 5 Esp., 52; see *Bank of Utica v. Mersereau*, 3 Barb. Ch., 533.)

D. McMahon, for the respondent. The promissory note in question being to one of the executors as an individual, and it being taken by them in settlement of the mutual demands of the estate against the defendant, it was proper for the executors to sue on the note in question in their own names individually, or in their own names as executors of Philetus Philips, deceased. (*Mercein v. Smith*, 2 Hill, 200; *Colby v. Colby*, 2 New Hamp., 420; *Biddle v. Wilkins*, 1 Peters, 686; *Mowry v. Adams*, 14 Mass., 327; *Merriitt v. Seaman* 6 Barb., 332; S. C., in 2 Selden.) The letters testamentary granted in this State are, of themselves, evidence of the right of the executor of the will of a non-resident to sue in this State. (2 R. S., p. 80, § 56; *Dayton on Surrogates*, 195; *Lawrence v. Lawrence*, 3 Barb. Ch., 71; *Smith v. Webb*, 1 Barb., 230.) The referee properly refused to permit Denison to disclose the private consultation between him and his client. (*Britton v. Loring*, 45 N. Y., 51; *Benjamin v. Coventry*, 19

Wend., 353.) The fact that a third person was present makes no difference. (*Jackson v. French*, 3 Wend., 337.)

BRADY, J.:

The plaintiff and Milton A. Goodenough, as executors of the last will and testament of Philetus Philips, deceased, brought this action to recover from the defendant the sum of \$4,500, due upon a promissory note by him, in settlement of all demands against him by the estate of said Philips. There had been litigation between the parties hereto, growing out of the partnership relations existing between the decedent and the defendant, but they were settled, and mutual releases executed. The note of the defendant, payable to the order of both executors, was given upon such settlement for the sum of \$4,500, for which the note in suit was exchanged, at the request of Goodenough, in order to enable him to sell it, the plaintiff refusing to indorse it and incur the liability which that act might create. The note not only belonged, therefore, to the executors, as the representatives of the decedent, but it was given after a final adjustment of their differences, and for the benefit of his estate. The defendant set up a counter-claim, and for about the same amount which he had asserted to be due to him from the decedent prior to the giving of the note, in this action set forth, and the execution and delivery of the releases. The defendant denied that he made the note for the benefit of the decedent, and in full settlement of all claims and demands against him, as alleged in the complaint, but he did not deny that he made the note. He set up, also, as a defense, the release which had been given him, by which it appeared that the consideration for it was the sum of \$4,500, the amount of the note. His counsel, when the trial began before the referee, moved to dismiss the complaint upon several grounds:

First. That his complaint did not set forth sufficient to constitute a cause of action.

Second. That there was no allegation in said complaint, that the instrument alleged to be the will of Philetus Philips had been ever proven, or admitted to probate in Philadelphia, Pennsylvania, or elsewhere.

Third. That the note in suit, having been made to Milton A.

Goodenough, or to his order, it does not appear in said complaint that it has ever been indorsed or delivered to the executors of the estate of the above named Philetus Philips.

Fourth. That the consideration for the making and delivery of said note, appears by the complaint to have been an indebtedness from the defendant to the estate of said decedent, and that neither said executors, nor any one else, had power or authority conferred on them, in any way, to receive said note in payment of such indebtedness.

Fifth. That by said complaint it appears that said note is without consideration, and was so made and delivered to Milton A. Goodenough by the defendant; and that if any action against the defendant and in favor of said estate exists, it is against the defendant upon the indebtedness for which said note is alleged to have been given, and not upon the said note.

Sixth. That it nowhere appears in said complaint, that the plaintiffs have, at any time since their alleged qualification as such executors of the last will and testament of said decedent, filed an inventory of said estate and its goods, chattels and credits. The motion was denied and exception duly taken.

The complaint contained facts sufficient to constitute a cause of action. It alleged the death of the decedent, at Philadelphia, in the State of Pennsylvania, leaving assets in that State, and in the city and county of New York, and that by his last will and testament he appointed the plaintiffs his executors. That thereafter the surrogate of this county, on an exemplified copy of such will, granted to them letters testamentary, whereupon they were duly qualified, and entered upon the discharge of their duties. That the defendant made the note mentioned for the benefit of the estate of the decedent, and in full settlement of all demands against him; that they, as executors, were the lawful owners and holders of the note, and that no part of it was paid. This view disposes of the third ground stated, because it appears that the note belonged to the estate, and, being prosecuted in the name of the payee, and he alleging that fact, it is wholly immaterial whether it was indorsed or not. It never belonged to the plaintiff Goodenough. It was not necessary to aver, in the complaint, that the will of Philetus Philips had been admitted to probate in Philadelphia, Pennsyl-

vania, or elsewhere. It was sufficient to aver, on that subject, the appointment of the plaintiffs as executors of such a will, and the granting of letters of administration thereupon by the surrogate of this county. The statute provides that in all cases where persons not inhabitants of this State shall die, leaving assets in this State, if no application for letters of administration shall be made by a relative entitled thereto and legally competent, and it shall appear that letters of administration or testamentary on the same estate shall have been granted by competent authority, in any other State in the United States, then the person so appointed, on producing such letters, shall be entitled to letters of administration in preference to creditors or any other person except the public administrator in the city of New York.* The statute also provides that letters of administration, granted by any officer having jurisdiction, shall be conclusive evidence of the authority of the persons to whom the same may be granted, until the same shall be reversed on appeal, or revoked.† The act of 1840 ‡ has no application to such a case as this. It applies to the will of a non-resident, duly executed within this State. The administration granted to the foreign executor, under the Revised Statutes, § is doubtless auxiliary to the original administration. The appointment of the foreign tribunal will be considered sufficient for the proper court to issue ancillary probate or letters of administration, as the case may be. | This disposes of the second ground stated.

The fourth ground, that the executors had no power or authority conferred on them in any way, to receive the note in payment of the indebtedness of the defendant; and the fifth, that if any action exists, it is against the defendant upon the indebtedness for which the note is alleged to have been given, and not upon the note, are wholly untenable. An executor not only has the power, but is bound, to compound and release a debt, if the interest of the estate requires it. He is obliged to act as a discreet and prudent man would act were the debt his own; ¶ and the note being the result

* 3 Rev. Stat. (5th ed.), 159, § 81.

† Id., 167, § 74 (56).

‡ Chap. 384.

§ *Supra*.

| Willard on Exrs., 162, and cases cited.

¶ In the Matter of Scott, 5 Legal Observer, 379; Murray v. Blatchford, 1 Wend., 583.

of a settlement and compromise, the anterior matters were merged in it.

The sixth and last ground, that it nowhere appears that the plaintiffs have, at any time since their alleged qualification as executors, filed an inventory of the estate, its goods, chattels and credits, is not well taken. We have not been referred to any adjudication holding that, when executors or administrators bring actions to enforce debts due to the estate they represent, it is necessary to allege the filing of an inventory. None to that effect has been found. In the case cited by the defendant's counsel,* the administratrix of a decedent, in this State, executed a release without having signed an inventory as required by the statute, and it was held that this was an essential prerequisite, and that she had no power over the personal estate therefor. The letters of administration granted to the plaintiffs were not original letters, as already suggested, but auxiliary, having been issued upon a previous appointment under the will of the decedent. Again, the allegation was that the plaintiffs were executors under the will, and had letters of administration thereupon duly granted to them, and that they had qualified. This was sufficient *prima facie* to show that they had performed all the prerequisites to the discharge of their functions. The motion to dismiss, upon the alleged insufficiency of the complaint, was, for these reasons, properly denied; and the second motion, at the close of the plaintiffs' case, was also properly denied, because all the facts averred had been established by proper testimony.

Several exceptions were taken during the trial, which it becomes a duty to consider and dispose of.

First. Goodenough, one of the plaintiffs, testified, without objection, to the compromise already mentioned, and to the exchange of releases; and they were offered in evidence in connection with the note. They were objected to, on the grounds stated in the motion to dismiss. The objection was, however, to the introduction of them collectively. The note was certainly admissible, and that disposes of the whole exception. Were it otherwise, the existence of the releases having been mentioned by the witness without objection, and one of them having been set out in the defendant's answer, it is

* *Jeroms v. Jeroms*, 18 Barb., 24.

very clear that the introduction of them, if they were irrelevant, was not error. They could not possibly affect his rights prejudicially.

Second. The plaintiffs' counsel offered, in connection with Goodenough's testimony, the different pleadings in the suits between the parties which culminated in the making of the notes and releases. They were objected to, but admitted. They were competent to show that the note was given for a valuable consideration, and for the benefit of the estate of the decedent, to which the suits related. They were offered for the purpose of showing what was involved in the litigations which had been pending, and for no other fact ; but, taken in connection with Goodenough's evidence, they established the allegation of the complaint, that the note was given in full of all demands, and for the benefit of the estate of the decedent, upon a settlement of partnership accounts: in other words, proved the consideration of the note which the defendant disputed by the answer.

Third. The plaintiffs offered in evidence, upon the subject of their appointment, certified copies of the letters of administration issued to them by the surrogate of this county, which were objected to on the grounds that there was no proof offered of the probate of the will of the decedent in Philadelphia, or the will or a copy of it put in evidence. The objection was overruled, and properly, for reasons already given. They were, as shown, conclusive upon the defendant.

Fourth. The defendant's counsel, upon the cross-examination of Goodenough, asked him whether the note in suit was not his own individual property, and he answered that it was not. He was also asked if it was not then his individual property, and he said it was not. He was then asked whether the executors of the estate had settled the estate prior to receiving the note in suit, and whether he had not advanced money to the different heirs of the decedent, or either of them, with the understanding that the money should be paid out of the proceeds of the note. These questions were excluded. They were wholly irrelevant. They had nothing whatever to do with the issues, and, if answered in the affirmative, could in no way invalidate the claim of the plaintiffs, as executors, against him.

Fifth. The defendant also moved to strike out so much of the evidence of the witness Goodenough, as related to the settlement

of the claims of the decedent against the defendant, and of the delivery of the note in suit, and of the releases, for the reason that the witness had no personal knowledge of any of the transactions, other than what he derived from Mr. H. C. Denison. The motion was denied, and properly, for several reasons, all of which it is not necessary to state. The witness, as already suggested, had stated the details of the settlement without objection, and had been cross-examined on the subject. He knew of the execution of the release by the plaintiffs, because he was a party. He knew of the release by the defendant, for it was in the possession of the plaintiffs, and it was set up in the answer of the defendant himself. He knew also of the giving of the note, because he had possession of it, and its making was admitted by the answer. The foundation of the objection was, therefore, wholly untenable. The witness had some personal knowledge of the transactions, other than what he derived from Mr. H. C. Denison. If, however, any defect existed in the links of the chain, they were supplied by Mr. Denison, who was subsequently examined.

Sixth. When the plaintiff rested, the defendant again moved to dismiss the complaint, on the ground that the plaintiff had failed to prove facts sufficient to constitute a cause of action. It has been already stated herein, that the disposition of that motion against him was a proper result. The defendant called but one witness on his behalf, and the exceptions taken to the exclusion of certain questions asked him, are all that remain undisposed of. The defendant did not essay to show the existence of a counter-claim; he seems to have abandoned that, but sought to prove that the plaintiff Goodenough attempted to negotiate the exchange note payable to his order. For this purpose Mr. Denison was put upon the stand. He had been the defendant's attorney in the actions between him and the plaintiffs, and proved the litigation, the settlement, the giving of the original note to the order of the plaintiffs, and the change of it for the one in suit, payable to the order of Goodenough only. He was employed, however, by Goodenough, in regard to a negotiation of the exchanged note, and was asked by the defendant's counsel, for what Goodenough wanted the note negotiated. This was objected to, and excluded upon the ground that the witness had, as stated,

acquired all of his knowledge on the subject while acting as Goodenough's counsel. He was also asked whether, when the communications claimed to be privileged were made, any one was present, and he said there was. He was then asked to give the conversation that took place between him and Goodenough, and also whether the conversation, had in reference to the negotiation of the note in suit, was with the person present, by either Goodenough, the witness or his attorney. These questions were objected to and excluded. The inquiry was totally irrelevant. It was not within the province of the defendant to inquire what the plaintiff or either of them designed to do with the note. They were responsible to the creditors, heirs or next of kin, for a faithful administration of the estate, and could make any disposition of the note they might think proper, so far at least as the defendant's relation to them was concerned. They owed him no duty on that subject. It was immaterial in another aspect, and that was, that whatever may have been the attempted negotiation, it had not been accomplished, for the note was intact and in the possession of the plaintiffs — a lawful instrument against the defendant. The question of the privilege which the plaintiffs called into requisition, was not necessary. It may be doubtful, on the authorities, whether the circumstances detailed would not have destroyed it, both from the character of the business to which it related and the presence of a third party. It is not necessary, however, to discuss the point. The evidence was properly rejected, and that proceeding is not the less potent because it can be sustained upon some rule of law other than the one assigned when it occurred. These views dispose of this appeal. The defendant, it would appear, had in fact no defense, and sought to avail himself of all the chances which a controversy like this might afford, not because he was not liable for the claim, but because delay was advantageous. It may be that this view is incorrect, but it is certainly warranted by all the developments signaling the trial.

The judgment should be affirmed, with costs.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

GEORGE SHUFFLIN, PLAINTIFF IN ERROR, v. THE PEOPLE
OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

4h 16
78 AD¹ 827

Witness — how may be impeached — Leading question — Indictment — what evidence admissible under — General demeanor of deceased — when immaterial — Laws of 1862, chap. 197, § 6 — murder in the first degree.

The plaintiff in error was tried and convicted for the murder of his wife, by means of an assault upon her person. The mother of the plaintiff in error was called as a witness, and testified that the assault was by no means a serious one. Upon her cross-examination she denied that she had told one Mary McGinn, on the morning after the murder, that she was in great trouble; that her son had been raising a great disturbance. Mary McGinn was called to contradict her, and asked whether she saw old Mrs. Shufflin that morning, to which question the prisoner objected as incompetent and leading. *Held* (1), that the evidence was admissible to impeach the testimony of Mrs. Shufflin; (2), that the question was proper in form.

The indictment charged that the death was occasioned by an assault, but did not aver that it was in any way produced by means of a knife. Upon the trial, a policeman testified that a knife, covered with blood, was found on the premises, and was then asked whether a knife, produced in court, was the one so found. The question was objected to as leading. *Held* (1), that the court could allow leading questions in its discretion; (2), that as the objection was put upon that ground, it could not now be insisted that the evidence was not admissible under the indictment.

A question, on the part of the defense, as to what the general demeanor of the deceased was when intoxicated, was excluded. *Held*, that this was proper; what her demeanor was on any other occasion than that of the homicide, or immediately preceding it, was immaterial.

This court has no authority over questions arising on the trial of an indictment, except such as is given by statute; in order to present the point, relied upon as error, an exception must be taken; without it the court has no power to set aside a verdict because it is unsupported by the evidence.

The court was requested to charge, in effect, that if the prisoner detected the deceased committing adultery, and thereupon instantly struck her, and from the effects of such blow she died, the killing was manslaughter, although the blow was given with intent to kill. *Held*, that the charge was properly refused; that such killing would be murder in the first degree.

WRIT of error to the New York Court of Oyer and Terminer, to review the conviction of the plaintiff in error of murder in the second degree.

Benjamin K. Phelps, for the defendants in error.

Charles W. Brooke, for the plaintiff in error. If the provocation, caused by meeting her paramour at the threshold of her bedroom, followed by the immediate discovery of his wife upon the bed in a nude condition, was great, and such as to excite strong indignation and passion, and under such provocation he killed her, he is guilty only of manslaughter, and that in the lowest degree. (Foster, 296; *State v. Samuels*, 3 Jones' Law, 74; 1 Hale P. C., 486; Wharton on Hom., 177, 178; 1 Hawk. P. C., chap. 31, § 36; *Wilson v. The People*, 4 Parker, 609; Wharton on Crim. Law, § 987; *People v. Johnson*, 1 Parker, 291; *Darrey v. The People*, 10 N. Y., 157, 161, 162.) The indictment charged, as the means of death, an assault made with the hands and feet of the defendant upon the person of the deceased; the judge erred in admitting evidence in relation to the knife. (*Jackson's case*, 9 State Trials, 715; *State v. Fox*, 1 Dutch., 566; *State v. Smith*, 32 Me., 369; *Rex v. Grunsell*, 7 C. & P., 788, PARKE, B.) If a person be convicted of one species of killing, as by poisoning, he cannot be convicted by evidence of a species of death entirely different, as by shooting, starving or strangling. (1 East P. C., chap. 5, § 107, p. 341; 2 Hawk. P. C., chap. 23, § 84; 2 Hale P. C., 185, 186; 2 Inst., 319; *Mackally's case*, 9 Co., 67; *Rex v. Martin*, 5 C. & P., 128; Wharton on Hom., 261; *R. v. Briggs*, 1 Mood. C. C., 318; *R. v. Thomson*, id., 139; *R. v. Kelly*, id., 113; *R. v. Bird*, 15 Jur., 193.)

DANIELS, J. :

The prisoner was convicted for the murder of his wife, by means of an assault upon her person, committed on the 14th of January, 1873. Their relations had previously been of a rather unfriendly nature, and both seemed to indulge in the use of intoxicating liquors. On the night when the homicide was perpetrated, he returned to his house, under the influence of liquor, and beat his wife, leaving her on the floor of one of the rooms occupied by them, where she was found dead in the morning, with severe wounds about her head. The evidence tended to show that those wounds had caused her death. The statement made by the prisoner, after the homicide was discovered, as well as his testimony given upon the trial, tended to show that he discovered his wife, when he first saw her on the evening of the assault, under circumstances indi-

cating that she had been guilty of adultery with a person issuing from her bedroom, and immediately assaulted her for that reason. But other evidence was given upon the trial, tending to discredit his statements and evidence, in this as well as other respects.

The theory of the defense was, that she cut her head in falling against the stove in the room, in an effort made by her to rise from the floor. And the evidence given by the prisoner's mother asserted that to be the case, and that the assault committed by the prisoner was by no means serious in its nature. Upon her cross-examination, she was asked whether she knew Mary McGinn, and whether she did not meet her in the yard the next morning, near the hydrant, and tell her that she had great trouble — that her son had been raising a great disturbance — in answer to an inquiry as to what was the matter. She gave a negative answer to these inquiries. And after the defense was through, Mary McGinn was put upon the stand to contradict her, by proving that she did, at that time and place, make those statements. The first inquiry made of her was, whether she saw Mrs. Shufflin that morning. This was objected to as incompetent and leading. The objection was overruled, and the prisoner's counsel excepted; and that exception is now urged as having been well taken. It is quite clear that the objection was not well founded. The statement which it was proposed by the prosecution to prove, was competent by way of impeaching the witness referred to. According to her evidence, the prisoner had done but little if anything more than take his wife from the bedroom, and lay her on the floor of the next room, and give her one slap on the side of the face. The statement inquired after, if it were made, was inconsistent with that evidence, because it tended to show that serious trouble and disturbance had been caused by the prisoner. And it would be a material contradiction relating to the important fact involved in the case, and it was admissible for the purpose of discrediting her evidence, and for that, it was received without objection on the part of the prisoner's counsel. It could not well be proved without first showing that the witness, by whom it was proposed to make the proof, had seen the witness whom it was expected to contradict, on the occasion when the interview was supposed to have taken place. The

answer was both necessary and proper for that purpose. And the approved mode of securing the response, was by a direct question embodying what the preceding witness had denied. *

It appeared by the evidence of one of the policemen, that a knife was found on the premises with blood upon it, in the morning, when the prisoner's wife was found dead, and that he asked the prisoner if he knew anything about how that knife had got such blood on it. He replied that he did not. The knife was produced, and the witness was asked if he saw that knife on the premises. This question was objected to only as leading. The objection was overruled, and the prisoner's counsel excepted. The witness answered that he did, and that there was blood upon it. It is now urged in the prisoner's behalf, that this evidence was improper because the indictment contained no averment that the homicide was in any way produced by means of a knife. But that objection was not made to the evidence offered. The objection was as specific as it could well have been made, and put upon the sole reason that the question was leading. By its form it substantially conceded that the answer would be proper if the question were differently framed, and that virtually surrendered the position now taken. The objection which was in fact taken is not now insisted upon, and it could not be with any degree of propriety, because the court in its discretion could allow leading questions to be propounded to the witness.

A witness, sworn on the prisoner's behalf, gave evidence tending to show that the deceased was in the habit of becoming intoxicated, and he was then asked what her demeanor was when she was in that condition. This was objected to by the prosecution, and excluded by the court, and the counsel for the prisoner excepted. It could not have been material what her demeanor was, on other occasions than that existing at the time of, or immediately preceding the homicide. Besides that, if her demeanor at other times had been in any respect important, the facts themselves should have been offered, not the conclusion which the witness might have drawn from those transpiring within his knowledge. † The prisoner can derive no benefit from this exception.

* *Sloan v. N. Y. Central R. R. Co.*, 45 N. Y., 125.

† *Messner v. People*, 45 N. Y., 1.

The homicide was committed while the act of 1862 was in existence. That divided the crime of murder into two degrees: the first, where the homicide was perpetrated with a premeditated design to effect the death of the person killed; the second, where it was caused, without any design to effect death, by a person engaged in the commission of a felony.* The evidence in no way tended to prove that the homicide was committed in the commission of any felony. The prisoner's crime, if murder at all, was murder in the first degree. But the court instructed the jury that they had the right under the evidence, if they believed him guilty, to convict him of murder in either of its degrees, or of manslaughter in any degree below the first. There was no exception taken to any part of this direction. And for that reason, even though there was nothing in the case warranting a conviction of murder in the second degree, this court cannot interfere with the determination which was made of it. The only authority which this court has over questions arising on the trial of an indictment, is that given by statute. And that requires an exception, in order to present the point relied upon as error.† Without an exception, this court has no power to set aside the verdict rendered because it may be unsupported by the evidence.‡ The court charged the jury that the prisoner's crime was murder in the first degree, if the homicide was caused by him with the intent to take the life of his wife. This was strictly in conformity to the construction placed upon the provision contained in the statute, by which that offense was at that time defined.§ The attention of the jury was then called to the provisions of the statute defining manslaughter in the second, third and fourth degrees. And they were left at liberty to convict the prisoner of either, if, under the evidence given in the case, they deemed him guilty of an offense less than murder. What was said upon the subject of murder in the first degree and manslaughter, was entirely free from exception, and no objection was made to it. Neither was any exception taken to the statement that the jury had

* Laws of 1862, chap. 197, § 6.

† 8 R. S. (5th ed.), 1028, § 23.

‡ People v. Thompson, 41 N. Y., 1; Gaffney v. People, 50 id., 417, 425; Wilke v. People, 53 id., 525.

§ People v. Clark, 3 Seld., 835; People v. Austin, 1 Parker, 154; Wilson v. People, 4 id., 619.

the right to convict of murder in the second degree. But at the close of the case, the court was requested to charge that if the prisoner detected the deceased committing adultery, and thereupon instantly struck her, and from the effects of such blow she died, the killing could only be manslaughter. There was no evidence in the case, in any manner tending to show that he detected his wife committing adultery, and thereupon instantly struck her. This proposition was properly refused for that reason.

The court was then requested to charge that the law regards adultery as so great a provocation, and makes such allowance for the passion which its discovery excites, that it absolutely reduces the grade of the offense of killing to manslaughter, and that, in the lowest degree. This was also refused, and an exception taken to the refusal. Whether the provocation mentioned, would reduce the killing to the lowest degree of manslaughter, could not have been properly held as a legal proposition in the case; that depended upon the circumstances to be found from the evidence, and determined by the jury.

It was not claimed that the homicide, if produced at all by the prisoner, was either justifiable or excusable. And the court had charged, that, if perpetrated without any design to take life, it was no more than manslaughter. More than that must therefore have been intended and understood by each of these requests, and no more could have been intended or understood by them, unless they included the fact of an intent on the part of the prisoner to take the life of his wife. If they did not include that circumstance, then the jury had been fully instructed on the subject, by the direction that the offense could be no more than manslaughter, without a design to take life, and the court was not bound to repeat the instruction. By including the intent to take life, both requests were rendered improper, for the statute in that case rendered the act murder. At common law, it may have been different, and undoubtedly was so. But that seems to have been changed by the statutory codification on the subject of homicide in this State, when felonious in any sense, that rendered the crime murder or manslaughter in one of its degrees. Intentional homicide, when felonious, was declared to be murder; but, when unintentional, the absence of intent reduced the offense to manslaughter. Under that

provision of the statute, if the prisoner caused the death of his wife with what it has denominated a premeditated design to effect it, that was sufficient to constitute the crime of murder, and the circumstances mentioned in the requests, could not then reduce it to either of the degrees of manslaughter. For the purpose of rendering it an offense of that character, the design to take life should not have been an element in the propositions presented to the court. Under the circumstances, they could not be construed as omitting that attribute. The terms in which they were expressed were inconsistent with any such understanding, and if there was no intent to take life, the prisoner already had all the benefit which these propositions claimed for him, by the charge the court had actually given. Neither of the points presented on the prisoner's behalf, will justify a reversal of the judgment pronounced upon him. The control of the court over the case is limited by the exceptions which were taken upon the trial, as long as no objection has been made either to the indictment or the judgment, and as neither of the exceptions can be sustained, the judgment should be affirmed.

DAVIS, P. J., concurred.

Judgment affirmed.

HENRY D. LODER, RESPONDENT, v. THE NEW YORK,
UTICA AND OGDENSBURGH RAILROAD COMPANY,
APPELLANT.

Receiver — when appointed — Judgment recovered against corporation through fraud of officers — presumption arising from failure to take direct proceedings to set aside.

The plaintiff, a judgment creditor of defendant, applied for the appointment of a receiver of the defendant, a corporation, which, as a defense to the motion, alleged that the judgment was obtained by the collusion and fraud of the president of the corporation; upon the hearing, time was given to make a motion to open the judgment on that ground, of which opportunity defendant did not avail itself. *Held*, that the court was authorized to infer, from its failure so to do, that the defense was without merit.

APPEAL from an order appointing a receiver of the property of the defendant.

Sullivan, Kobbé & Fowler, for the appellant.

John A. Wright, for the respondent.

DANIELS, J. :

The receiver was appointed on the application and behalf of a judgment creditor, in whose favor an execution had been issued against the property of the defendant, and returned unsatisfied. For the purpose of procuring the appointment of the receiver, an action was commenced by the creditor, as required by the statute prescribing the proceedings to be taken for that object.* The complaint was sworn to, and presented a case for the appointment of a receiver, and the sequestration of the property of the corporation for the creditor's benefit.

The application was opposed upon a sworn answer, charging that the judgment was collusively recovered for goods sold to the defendant's president, and not to or for the company. Upon the hearing which was had, the proceedings were suspended to afford the defendant an opportunity to apply to the court in which the judgment was recovered, to set aside the default, and for leave to defend the action. The defendant failed to make that application, and relied upon its answer as sufficient to entitle it to a denial of the plaintiff's motion. But the court held otherwise, and appointed the receiver. If the judgment was recovered on a demand for which the defendant was not liable, the most convenient mode of trying that, was the one indicated by the court, on the suspension of the motion. If that was the fact, and the judgment was collusively or fraudulently recovered, the most direct road to redress was an application for leave to defend the action in which it was recovered. It was so obviously so, that it is to be presumed that the defendant would have adopted it when the opportunity for doing so was offered, if it had any well founded complaint against either the justice or validity of the judgment. That it voluntarily failed to do that, is a strong circumstance against the good faith of the position taken by

*Vol. 1, Laws of 1870, 422, § 3.

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the answer against the enforcement of the judgment. The omission subjected it to the suspicion that the real object of the defense presented, was more to secure delay than the vindication of the defendant's rights. For that reason the court was justified in the conclusion, that the objection urged against the appointment of the receiver, was without meritorious support. That would be the inference ordinarily drawn from the course pursued by the defendant in this case; for where the facts will sustain either proceeding, that of a direct application for leave to defend, is much more likely to prove successful than a collateral attempt to impeach a judgment recovered by a default capable of being reasonably excused.

Upon the proofs before the court, there was no error in the appointment of the receiver. It is the mode provided by law for the collection of the creditor's debt, after the return of an execution unsatisfied; * and no change has been made in it, beyond that requiring that it shall form the subject of an action instead of being by petition, as was provided by this section of the Revised Statutes.

The order appealed from should be affirmed, with ten dollars costs, besides disbursements.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed with ten dollars costs, besides disbursements.

MARGARET WHALEN, RESPONDENT, v. ELIZABETH A.
GLOUCESTER, APPELLANT.

4 24
130a 286
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13ap 358
4 24
156a 359

4h 24 *Owner of real estate—liable for injuries resulting from its dangerous condition—*
78 AD¹⁴²⁵ *Cover over hole in sidewalk—persons interfering with sidewalk liable for injuries*
resulting from such interference.

The owner of property which is in a dangerous condition when it is leased, is responsible for injuries resulting to a third person by reason of such owner's failure to put the property in proper condition.

A cover to a hole in a sidewalk becomes a part of the highway, and must be as secure as the walk itself.

* 3 R. S. (5th ed.), 763, § 44.

A person who interferes in any way with a sidewalk in a city, and leaves it in a dangerous condition, is liable for injuries caused thereby, whether he knew it to be dangerous or not, and irrespective of any permission from the public authorities to do the work from which the injury arises.

APPEAL from a judgment entered upon the verdict of a jury.

F. P. Bellamy, for the appellant. Evidence of condition of coal-hole previous to time of accident is clearly inadmissible to charge the defendant, unless it is proved that defendant was in possession or had knowledge of the alleged defect, and was guilty of some negligence. (*City of N. Y. v. Corlies*, 2 Sandf., 301; 36 N. Y., 153; *Galt v. Gandy*, 22 Eng. Law and Eq.; 14 Gray [Mass.], 249; 35 N. Y., 269.) The presumption of law is (even in an action by third party for damages occasioned by neglect to repair a building) that the tenant is bound to repair, and therefore that landlord is not liable for neglect to do so, especially when tenant is in possession under covenant to repair. (*Cheetham v. Hampton*, 2 Durnford & East [Court of King's Bench], 186-189; *Regina v. Sir John Ruckwall*, 2 Lord Raymond, 804; *City of New York v. Corlies*, 2 Sandf., 301; 4 E. D. Smith, 20; 2 H. B. L., 349; 14 Gray [Mass.], 249.) There being no wrongful act to be inferred from building coal-hole and cover similar to others in the city, and no evidence that it was not well built, and no neglect being proved, defendant not even knowing of alleged defect previous to accident, there can be no presumption of liability from mere fact of cover of coal-hole being out of order. (36 N. Y., 153; *id.*, 54; 3 Abb. Pr. [N. S.], 240; 34 How., 250; 59 Barb., 497; 12 N. Y., 236.)

A. R. Dyatt, for the respondent. Where a person makes any opening or excavation into or beneath a public highway, for his own convenience, he is bound to see that at all times it is so protected as to be absolutely safe for passengers; and this entirely apart from any question of negligence. (37 N. Y., 568, 574; S. C., 16 Abb., 241, in court below; 5 Trans. Appeals, 254; 1 Robertson, 238, 245; 18 N. Y., 79, 84; 38 *id.*, 449; 28 Barbour, 196.) Nor can such a person escape liability for a failure to perform his duty to keep the highway safe, by throwing the burden upon some other person through the medium of any agreement between himself and

such other person. (1 Robertson, 238, 245; 17 N. Y., 108; 32 Indiana, 45; *Chicago v. Robbins*, Am. Law Reg. [N. S.], vol. 11, pp. 535, 536, 537; *State v. Dover*, 47 N. H., 452.)

BRADY, J.:

The plaintiff in this action was severely and permanently injured by the upturning of a coal-slide cover, on the sidewalk of the defendant's premises, which was neither fastened by a chain nor securely rested on its bed. The plaintiff, in alighting from a carriage, on the 25th of May, 1868, put her foot upon the cover, it turned, and her leg went down the hole or slide, and she was severely cut by one of the prongs or plugs forming a part of the cover. The premises were at the time in the possession of the defendant's tenant, and had been for several years previously. On the 1st May, 1868, however, he renewed his lease of the premises, at which time, or rather previous to which time, and in the March preceding that date, the defendant, by the agreement of renewal, was to put the house in good order, and the tenant was to keep it in that condition. There was evidence given, showing that the cover had been in a dangerous state for months prior to the 1st of May, 1868, one of the three prongs necessary to keep it in its place having been broken at that time. The witness who gave that evidence, also testified that he slipped over it himself, and saw that there was one plug off. I was, he said, nearly falling in. It was also shown that the defendant knew a child had been injured or endangered at the cover. Mr. Peiser, one of the plaintiff's witnesses, who went to see her on behalf of the plaintiff, detailed a conversation with her, in which he said, among other things, that a child had been injured at the same place; to which she said: "Oh, no, the child was not injured; the child was not hurt at all." It is true that the defendant denied having had any conversation about a child, but the testimony was positive on the part of the witness. The defendant did not deny the statement of her tenant, that she agreed to put the house in good order, or have any repairs done; nor did she show any permission to use the cover obtained from the city authorities. It seems to have been conceded on the trial, however, that it was placed where it was by proper license for that purpose. Some exceptions

to the introduction of evidence were taken during the trial, and an exception also taken to the charge. The presiding judge placed the defendant's liability chiefly upon the proposition, that, if the covering of the vault or slide was in an insecure condition, at the time the tenant went into possession, on the 1st of May, 1868, under the new tenancy, she was responsible for the injuries received by the plaintiff. The accuracy of this view is now presented for consideration. The liability of the mayor, aldermen and commonalty in such a case as this has been settled,* although the cover may have been manufactured after their regulations on the subject, and for the reason that it is their duty to see to it that the covers are secure and kept so. The only proviso limiting such responsibility is, that the mayor, etc., shall have actual or constructive notice of the defect of the cover, or of its insecurity. Assuming, and the assumption is for her benefit, that the defendant had permission to use the cover as provided by the ordinances,† the use of it necessarily imposed upon her the obligation to keep it in repair, fit for the purpose, and perfectly safe—as safe as the street itself should be—for the passer by. A cover becomes a part of the highway or walk, and must be as secure to the wayfarer as the walk itself. The public are not called upon to examine ordinances relating to such a subject, or to do police duty, or to stop and examine the vault or slide covers. They have a right to assume that they are safe, unless it is apparent, and without examination, that they are not.‡ The defendant, having sought permission to use the street or walk for her private benefit, took upon herself, in reference thereto, all the obligations imposed by law upon the corporation. She assumed a duty to the public, and must bear the burden.§ It is a well settled rule, said FOSTER, J., that a person who interferes in any way with a sidewalk in a city, and leaves it in a dangerous condition, is liable for injuries caused thereby, whether he knew it to be dangerous or not, and irrespective of any permission from the public authorities to do the work from which the injury arises. |

* Reinhard v. The Mayor, 2 Daly, 248.

† See Revised Ordinances of 1845, chap. 18, p. 251.

‡ Reinhard v. The Mayor, *supra*.

§ Jones v. Chantry, 4 N. Y. Sup. Ct. Rep., 63; Radway v. Briggs, 37 N. Y., 256.

| Sexton v. Zett, 56 Barb., 119; Davenport v. Ruckman, 37 N. Y., 568; Congreve v. Smith, 18 id., 79.

There is, however, another view to be taken of this case, which presents the theory upon which the defendant was held to be liable on the trial. It appeared, and the jury so found, that the covering was in an insecure condition — out of repair — when the new term of the defendant's tenant began, and had been so prior to that time; and that fact was sufficient to cast upon her the obligation to remunerate the plaintiff for her injuries. The principle has been decided.* The defendant, it appeared in that case, leased a pier to another, the lessee agreeing to keep the same in repair. At the time of leasing, there was a defect in the pier, in consequence of which the plaintiff's intestate received injuries from which he died. The accident happened after the lessees had taken possession. Held, that the defendants were liable for the injury. In *Davenport v. Ruckman*,† the defendant Ruckman, the action being against him and the mayor, aldermen, etc., of this city, was, it appeared, the owner of a house built on leased ground. He had allowed the cellar-way to become and remain in a dangerous condition. He had sublet the premises, agreeing to put them in repair, but he failed to do so, and they were therefore in a dangerous condition when the tenant took possession. It was held that this did not operate to relieve the defendant from his liability. It simply added another party to the negligence. It seems to be clear, therefore, that the defendant is liable on both theories herein presented, namely, upon her obligations to the public in her use of the street for her private purposes, and upon her failure to keep the premises in repair, as between her tenant and herself, even if such relation of landlord and tenant, and the consequent possession of the latter, might otherwise excuse her.

The evidence relating to the condition of the plaintiff's health, and to the appearance of the tumor and its cause, was properly received. She had a right to show all the circumstances attendant upon, and the result of, the injuries received. The exceptions thereto were not well taken. The evidence of the condition of the covering prior to the accident, was properly admitted, bearing, as it did, upon the question whether the defendant had put the premises in order, at or immediately prior to 1st May, 1868.

The exception to the judge's charge, that the defendant was

* *Swords v. Edgar et al.*, 1 N. Y. Sup. Ct. Rep., addenda, 23.

† *Supra*.

liable if the defect existed on the first May, was not well taken, for the reasons hereinbefore assigned. There is nothing, therefore, contained in the case which calls upon us to reverse or interfere with the judgment, and it must be affirmed.

Present — DAVIS, P. J., DANIELS and BRADY, JJ.

Judgment affirmed.

CHRISTIAN S. DELAVAN, APPELLANT, v. FLEMING
DUNCAN, RESPONDENT.

Specific performance — delay induced by defendant no defense in action for.

Where land contracted to be sold was incumbered by a judgment against the vendor, an appeal having been taken, however, in the action in which the judgment was recovered, and on the application of the vendee's agent for the fulfillment of the contract, the vendor said the vendee would have to wait till the suit was settled, which statement was communicated to the vendee, who said, "very good," and proceeded to have his contract acknowledged and recorded: *held*, in an action brought by the vendee for specific performance, after the judgment had been reversed, that the vendor was bound to assume that his answer would be communicated to the vendee, and could not set up the vendee's delay which he had himself caused.

APPEAL from a judgment dismissing plaintiff's complaint. The action was brought for the specific performance of a contract for the sale of certain real estate by the defendant to the plaintiff. The examination of the title disclosed the fact that a judgment lien upon the premises existed against defendant.

James Emott, for the appellant.

Mr. Dunning, for the respondent.

BRADY, J. :

The defendant could not convey the premises which he had sold to the plaintiff, unincumbered, because there was an existing unsatisfied judgment against him, but from which he had appealed. He contemplated settling it, but failed to do so ; and, on

an application made on behalf of the plaintiff, by Mr. Elliot, the broker who had acted for the defendant in the sale, the defendant said that the plaintiff would have to wait until the claim was settled in the Court of Chancery or Court of Appeals, or wherever it was, and this was communicated to the plaintiff, who said, "very good," and then proceeded to have his contract duly acknowledged and recorded. It is claimed, however, that the answer of the plaintiff was not communicated to the defendant, and that he knew nothing of it. If this were so, it would not seem to aid him. The question which intervenes between the plaintiff and the specific performance which he seeks to obtain, is one of laches, and that is dependent upon the further question, whether the delay is excused. The Court of Appeals had this view of the case before them on the appeal taken in this case,* but said there was no evidence to sustain the charge that the defendant said the plaintiff must wait, as detailed herein. It is not, as supposed by the defendant, necessary that there should be in this case an agreement to delay, binding on both parties. The obligation to perform already existed, and would be enforced, unless, by delay for which there was no excuse, the plaintiff had deprived himself of his right to demand performance, according to well established principles. But the defendant was bound, under the circumstances, to assume that his answer would be communicated to the plaintiff, and if he desired to know whether it was or not, it was incumbent upon him to ascertain it. He was the person in the wrong. He had failed to carry out his agreement. The plaintiff was ready and eager, and that eagerness was demonstrated by his inquiries and the proof and record of his contract, and which circumstances were in themselves constructive notice to the defendant that he intended to enforce it. It appears that Mr. Elliot, on the part of the plaintiff, had several interviews with the defendant on the subject, and this kept the matter alive, even if the defendant were disposed to regard it as obsolete and abandoned. The plaintiff, it appears, therefore assented to the proposition of the defendant that he must wait. He did so, and, when the defendant's litigation was ended, the plaintiff advised him that he wanted the deed of his house, to which the defendant responded by saying, you will have to wait. There was, according to the evidence, no

* See 49 N. Y., 485.

suggestion of any right to refuse to complete or perform the contract. The delay on the part of the plaintiff, seems to have been satisfactorily excused. If he chose to await the result of the defendant's appeal from the judgment which prevented him from conveying the property unincumbered, and upon the request of the defendant thereto, he could lawfully do so. The legal effect of such an arrangement was an extension of the time of performance on his part, or a waiver of the due performance of the contract in point of time, on the part of the defendant. To permit the defendant now to avoid responsibility, by resorting to the plaintiff's delay which he invoked, would be to allow him to take advantage of his own wrong. The judgment for these reasons is erroneous, and should be reversed.

Present — DAVIS, P. J., DANIELS and BRADY, JJ.

Judgment reversed and new trial ordered, costs to abide event.

IN THE MATTER OF THE PETITION OF MARY A. TOWNSEND,
APPELLANT.

Mortgages—discharge of, from record under statute—chap. 365, of 1862—chap. 798, of 1868—chap. 551, of 1873.

Chapter 365, of 1862, as amended by chapter 798, of 1868, as amended by chapter 551, of 1873, is designed to remove an existing incumbrance upon real estate, which has been paid in fact and not by mere presumption of law.

When a remedy is given by statute all the requirements imposed by it must be complied with.

APPEAL from an order of the Special Term, denying an application to have a mortgage discharged of record.

Samuel N. Stubbs made a mortgage to Hiram Parker, dated June 22, 1838, and recorded June 26, 1838. Parker assigned said mortgage to Campbell, September 4, 1838, and Campbell assigned it to Mary Spingler the same day. Both assignments were duly acknowledged and recorded, November 24, 1838. Mary Spingler died intestate in or about the year 1839, and no administration was

had on her estate. The respondent is the next of kin and heir at law of Mary Spingler. Stubbs conveyed the property to the appellant. On appellant's petition stating these facts, and that the mortgage had been paid, an order was made calling on all persons interested to show cause why an order should not be made discharging said mortgage. The respondent showed cause upon an affidavit denying that the mortgage was ever paid, and averring that interest was paid to December 22, 1839, and that no payment of principal or interest had been made since that day.

John Townshend, for the appellant.

Edward Mitchell, for the respondent.

BRADY, J. :

The act of 1862, to authorize the discharge of mortgages of record in certain cases, * and the amendment thereof by acts of 1868 † and 1873, ‡ are designed to remove an existing incumbrance which has been paid in fact, and not by mere presumption of law.

It is required, among other things, that the petition "shall allege that such mortgage is paid;" not alone that twenty years having elapsed it is presumed to be paid, but that it is paid. The object of the statute seems to have been to relieve mortgagors and those claiming under them, in a summary way from an incumbrance which, as stated in the first section of the act, *supra*, from the lapse of time is presumed to be paid, if it have in fact been paid, but satisfaction of which cannot be obtained without a formal proceeding therefor, in a court of equity, in consequence of the death of the mortgagee, and of the fact that no letters testamentary or of administration have been granted in this State. The petition must allege that the mortgagee has been dead for more than five years, and that the letters mentioned have not been granted. § It is true that the acts also require a statement of the assignment, if one have been made, and the "facts in regard to the same," without exacting an averment that the assignee is dead; but that does not destroy this general design of the statute. The chief object of requiring the statement of the assignment, is to enable the court to

* Laws 1862, p. 610. † Laws 1868, chap. 798. ‡ Laws 1873, p. 862. § Sec. 1.

have all persons interested notified of the application in accordance with section 3 of the act. Whether there be an assignment or not, however, the court must be satisfied that all the matters alleged in the petition are true.* Satisfied of what? The principal fact is the payment of the mortgage. It must, as shown, be alleged that it is paid. It is not proved in this matter that the mortgage is paid. The evidence is that it is not, except by presumption of law, which is not sufficient on this summary proceeding.

The statute under consideration relates to mortgages presumed from lapse of time to have been paid, but it requires, as already shown, an allegation, and, therefore, proof of payment. The principle is well settled, that, where a remedy is given by statute, all the requirements imposed by it must be complied with.† Here the petitioner fails in the most important allegation, the one indeed upon which the whole application rests. The order of Special Term should be affirmed. The petitioner must seek relief in another mode.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs besides disbursements.

CHARLES P. KNIGHT, RESPONDENT, v. MICHAEL J.
MOLONEY, APPELLANT, AND OTHERS.

Mortgage foreclosure — irregularity — when sale will not be set aside for — Purchaser refusing to complete purchase — charged with expenses of resale.

A court of equity will not order a resale of premises under a mortgage foreclosure for an irregularity in form, when it is apparent that the purchaser cannot be injured by it.

On a mortgage foreclosure, in which both the purchaser at the sale had thereunder and his wife were parties, the wife, being an infant, appeared by attorney. The purchaser, having paid ten per cent at the time of sale, refused to complete the purchase, on the ground that the interests of his wife in the premises were not foreclosed. *Held*, that, as the effect of the conveyance to him would be to give the wife the same interests which would have been foreclosed had she properly

* Sec. 4. † *Dudley v. Mayhew*, 8 Coms., 9; *Renwick v. Morris*, 3 Hill, 621.

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appeared in the action, he was not injured by the irregularity complained of, and was bound to complete the purchase.

A resale having been ordered on his refusing to pay the residue of the purchase-money, *held* that he should be charged with the expenses thereof, but not with the expense of proceedings taken to cure the irregularity in the foreclosure as to his wife's interests in the premises.

APPEAL from an order of Justice DONOHUE, directing a purchaser to complete his purchase of real estate, sold under foreclosure of a mortgage.

J. H. Hull, for the appellant.

A. D. Ditmars, for the respondent.

BRADY, J.:

Michael J. Moloney, the purchaser, was a party defendant to this action, entitled to a moiety of the equity after payment of the mortgage. His wife, Malvinia, was also a party, but was an infant under the age of twenty-one years. They both appeared by an attorney, who was not aware of the infancy of Malvinia. The plaintiff's attorney was also ignorant of that fact, and it was not revealed until after the sale, when the defendant Michael, having become the purchaser, refused to complete in consequence thereof, and of the failure to have a guardian *ad litem* appointed for his wife. The father of Michael was also unaware of such infancy until after the sale, when he was informed of it by the plaintiff's attorney, who had been advised thereto by the attorney for Michael. Mr. Justice DONOHUE refused to release Michael from the purchase, upon the ground that a deed to him would restore the dower right of his wife, and that he could not, nor could she, be in any way affected by the alleged irregularity. He suggested that if Michael were a stranger, that is to say, not a defendant, there might be something in the point taken. He ordered the referee, therefore, to pay out of the ten per cent in his hands, his fees and the expenses of the sale; also the costs of the plaintiff's attorney, as directed by the decree of foreclosure; and that he retain the residue of the ten per cent until a resale of the premises, as security for any deficiency that might arise on the sale, but at the same time ordered that the judgment be vacated and set aside, and that the action be prosecuted

against Malvinia as an infant, in case the purchaser, Michael, failed to complete.

It appears from the plaintiff's points, that a subsequent sale took place, and that the premises were conveyed to Patrick G. Moloney, and the plaintiff's debt paid.

The defendant Michael having refused to perfect his purchase, and the premises having been resold, the question really presented by this appeal relates to that part of the order in regard to the ten per cent. The alternative portion of the order is a concession that the proceedings were irregular, and, except as to the defendant Michael, could not be upheld. A court of equity would not order a resale for an irregularity in form, when it is apparent that the purchaser could not be prejudiced by it. The purchase by Michael, consummated by a deed to him, would immediately restore the dower right of his wife, not only to the extent of her interest in his prior share of the property, but to the whole of the property of which, by the purchase, he became the sole owner. In fact, therefore, she was benefited by the purchase, and the irregularity became, in all respects, on this theory, wholly unimportant. This view was entertained at the Special Term. The defendant Michael must be presumed to know of his wife's age, and it was his duty to disclose it to his attorney at least, when he engaged or employed him to appear for himself and wife. He did not do so, and his refusal to complete, when, as suggested, the deed to him would reinstate his wife in all her rights in relation to the property, does not seem to have been in good faith. The resale was, under the circumstances, unnecessary, unless the defendant Michael desired, for other reasons, to be relieved from the purchase he made; and he was afforded the opportunity to retire on the payment of the sums directed, and on the conditions named. As the sale was unnecessary, it was proper that he should pay some part of the expenses to be incurred by it, and the question is whether too much was required of him by the order. We think he should not be compelled to pay the costs of subsequent proceedings to make them regular, or, in other words, to correct the error in omitting to name a guardian *ad litem*, but only the expenses of the resale after the proceedings were perfected, and which should be deducted out of the ten per cent, or his share of the proceeds of the second sale.

We think, also, that no allowance of interest should be made to him on the ten per cent, and that no costs to either party should be allowed on this appeal. This result is predicated of the admitted irregularity of the plaintiff's proceedings, and the seeming want of good faith on the part of the defendant Michael, in reference to the completion of his purchase, and of the equity of such a conclusion.

It is therefore adjudged that the order at Special Term be modified in accordance herewith, and that Michael J. Moloney be released from his bid.

DAVIS, P. J., and DANIELS, J., concurred.

Ordered accordingly.

HANNAH LODER, ADMINISTRATRIX, ETC., RESPONDENT, v.
GILBERT J. HATFIELD AND OTHERS, APPELLANTS.

Legacies—Distinction between postponement of payment for benefit of estate and such postponement with reference to situation of legatees—Action for sale of real estate—prepayment of legacies—statute of limitations—ten years.

When the circumstances and condition of the legatees, and the circumstances of the estate and of the devisee, show that the time given for the payment of legacies was designed for the benefit of the estate, and not with reference to the circumstances or situation of the legatees, the legacies do not lapse by reason of the death of the legatees before the time of payment.

An action for the purpose of having a sale decreed by a court for the payment of legacies, is an equitable action, and must be brought within ten years after the cause of action accrued.

APPEAL from a judgment of the Special Term, ordering a sale of lands to pay legacies charged thereon.

Joshua Hatfield died August 7th, 1820, leaving a will dated August 5th, 1820, by which he devised a farm to his son Jonathan Hatfield, the husband of defendant Sarah, and father of the other defendants, on the following conditions and proviso, among others, viz.: "I order and direct my said son Jonathan to pay unto my three daughters, Hannah, Eunice and Sarah, \$400 each, which I give and bequeath to them and their heirs forever."

“ And, furthermore, I order and direct that my four daughters, Phebe, Hannah, Eunice and Sarah, shall live with Jonathan and their mother, and to have a support on the farm, and to assist, as usually they have done, in carrying on the business in the house, and the money I have above bequeathed to them to be paid in one year after they shall severally marry or be inclined to leave Jonathan and their mother, and live elsewhere.”

The legacies to Martha (testator's wife) and to the daughters Phebe and Hannah (the plaintiff) were paid by Jonathan.

Sarah and Eunice remained unmarried, and resided on the farm until they died, aiding in the work.

Jonathan accepted the farm devised to him, entered into possession, and owned and occupied it till his death in January, 1870. He devised the farm to his wife, the defendant Sarah, for her life; remainder in fee to his sons.

Sarah Hatfield, the daughter and legatee of Joshua, died May 8th, 1856, having, on December 13th, 1855, assigned her \$400 legacy to her sister Eunice.

Eunice died August 19th, 1871, intestate, and owning both the legacy given to herself and that given to Sarah, neither of which has ever been paid. Letters of administration were duly granted to Hannah, the plaintiff, by the surrogate of Westchester county.

The court, at Special Term, decided that the legacies to Sarah and Eunice were valid, vested, a charge on the land, and due and unpaid, and ordered judgment of sale to pay the legacies and interest thereon from a year after the death of Sarah and Eunice respectively, with costs.

Close & Robertson, for the appellants.

Edward Wells, for the respondent.

BRADY, J.:

It is conceded by the appellant, that the legacies to Sarah and Eunice are payable out of the real estate of the testator, and that if the payment of them is postponed in regard to the convenience of the person and the circumstances of the estate charged with the legacies, and not on account of the age, circumstances and condition of the legatee, or, in other words, was postponed for the

benefit of the devisee or the estate devised to him, then they did not lapse and fall into the inheritance, either by the death of the legatees before marriage, or their failure to depart from the house of the devisee during life. The concession is based upon the authorities which thus declare the rule.*

The application of the rule thus stated, depends upon the circumstances of each case. If the condition was annexed to the legacy, and not its payment, the rule would in general be more in harmony, it would seem, with the intent of the testator. It may be that the gift and the time of its payment are necessarily united, and are the same, therefore, in legal effect, but there are cases not in the courts of this State, in which the doctrine is promulgated that, unless the condition or contingency applies to the legacy itself, the direction of its payment at a future day does not affect it, and it vests immediately. The rule itself, as pronounced in this State, must necessarily rest upon the supposed intention of the testator, which is a governing principle in the construction of wills, and is generally called into exercise where the payment of the legacy is deferred until the marriage of the legatee, or until he arrives at age. It is nevertheless qualified by circumstances affecting either the legatee or the devisee, in reference to the payment of the legacy, as we have seen.† The question here, therefore, on that subject, neither contingency in reference to payment having occurred, is, whether the postponement of payment was for the benefit of the estate or the devisee. The legacies are, by the terms employed, absolute in character: "I order and direct my said son Jonathan, to pay unto my three daughters, Hannah, Eunice and Sarah, \$400 each, which I give and bequeath to them and their heirs forever;" and they were charged upon the farm or homestead given to Jonathan, which he took upon the expressed condition or proviso that he should pay the legacies. The gift is in the first paragraph of the will succeeding the proviso. In the second paragraph, and therefore not immediately connected with the gift, the provision in reference to the time when the legacies shall be paid is found. That paragraph begins: "And furthermore, I order

*Harris v. Fly, 7 Paige, 421, 436; Marsh v. Wheeler, 2 Edw. Ch., 156, 163; Sweet v. Chase, 2 Comst., 73; Birdsall v. Hewlett, 1 Paige, 32; Willard Eq., 519.

† Cases *supra*.

and direct that my four daughters, Phebe, Hannah, Eunice and Sarah, shall live with Jonathan and their mother, and to have a support on the farm, and to assist as usually they have done, in carrying on the business in the house, and the money I have bequeathed them to be paid in one year after they shall severally marry or be inclined to leave Jonathan and their mother, and live elsewhere."

It will be perceived that the testator alludes to the legacies not as such *eo nomine*, but as the money he has bequeathed them, which is to be paid when they marry or determine to leave their mother, and live elsewhere, and thus reaffirms the intention that the legacy to each should be paid, and not be contingent upon any event. The phrase, "the money I have bequeathed them," coupled with the words, "\$400 which I give and bequeath to them and their heirs forever," leaves no room for conjecture from the language employed, as to the intent of the testator to give his daughters, under any and all circumstances, a vested legacy in the sum named. This intention is one which the courts would not fail to carry out, unless there was in some other feature of the will a controlling legal element to the contrary. *

It is necessary here, nevertheless, to consider whether the postponement of payment, or rather the time allowed the devisee to pay the legacies, was or was not for his benefit. It seems to be evident that the question depends much upon the character of the bequest. Here, as we have seen, it seems to be in form a vested and absolute legacy. The payment of it in one year after the legatee should marry, or be inclined to leave the devisee and her mother, was not for the benefit of the legatee, but, as asserted by the plaintiff, for the benefit of Jonathan, the devisee, so that he should not be burdened with the support of the legatees and the payment of the legacies at the same time. It was for his benefit also, because it gave him one year after such support had ceased to be obligatory upon him by the marriage or departure of the legatee, within which to pay the legacy. This was not a provision in reference to the circumstances of the legatee. There was nothing in the surroundings or condition of the legatees, which required any precaution as to the payment, or the consideration of any circum-

* See Sweet v. Chase, *supra*; see, also, Terrill v. Pub. Admr., 4 Bradf., 245.

stance, which made it advisable to expedite the payment on their account. They were provided for. They were to live at the homestead if they chose to do so, and to be supported there by the devisee, who took the devise burdened with that obligation, although they were to assist as before, "in carrying on the business in the house," and thus to a certain extent earning their support. With regard to the devise, however, a different view is presented. It may be assumed with propriety, that the circumstances of the estate, or those of the devisee, were such as to make it advantageous to have a year to gather up and pay the legacy which would become payable by either of the contingencies expressed. This would appear to be so, because the devisee could not, by the terms of the will, sell the estate or his interest in it, until the death of his mother, the testator's widow; and not having any power to sell, he would be compelled to get the money from other sources. The testator, though he charged the land with the payment of the legacies, intended that, on the happening of either contingency named, and within one year thereafter, they should be paid whether the land was sold or not. It would seem, therefore, that, duly considering the bequests made, the circumstances and condition of the legatees, and the circumstances of the estate and of the devise, that the time given for the payment of the legacies was designed for the benefit of the estate, and not of the legatees of the money; and they did not, therefore, lapse and become a part of the inheritance.

The legatee Sarah Hatfield died on the 8th May, 1856, but this action was not commenced until the 15th May, 1873, and it is said that the claim is barred by the statute of limitations. The statute of limitations does not, in terms, specify the time within which an action must be brought to recover the amount of a legacy, but it has been declared, and it seems to be sustained by the provisions of the statutes, that it must be brought within ten years from the time it becomes payable.* The Revised Statutes provided that whenever there was a concurrent jurisdiction of courts of common law, and in courts of equity, of any cause of action, the time limited for the commencement of such cause of action in a court of common law, should apply to all suits brought for the same cause in the Court of Chancery.† But if it be a case where the Court of Chancery alone

* *McCartee v. Camel*, 1 Barb. Ch., 455. † 2 R. S., 301, § 49.

have jurisdiction, the suit should be commenced within the time prescribed for the commencement of suits of the same character in equity, the subject-matter of the suit not being cognizable in the courts of common law. *

The Revised Statutes also declared that bills for relief in equity in all cases not provided for in chapter 4, "Of actions and the times of commencing them," should be filed within ten years after the cause thereof should accrue, and not after. † This action is one on the equity side of the court, praying the sale of the premises for the payment of the legacies with which they were charged assuming them to be, as indeed they are, an equitable charge upon the estate devised. ‡ The case of *McCartee v. Camel*, § was commenced before the Code of Procedure was adopted. The seventy-third section of the Code repealed the provisions contained in the chapter 4 | "Of actions and the times of commencing them," and substituted the provisions of title 11, of the Code, entitled, "Of the time of commencing actions." There are many causes of action specifically designated in this title, but the action by a legatee is not one of them, and there is not therefore any express limitation as to them contained in it. There is not in that title any reference *eo nomine* to equitable actions or actions of an equitable nature, but there is a provision similar to that contained in the Revised Statutes, and to which reference has been made herein, and which is as follows: Section 97. "An action for relief not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued." It would thus appear that both by the Revised Statutes, and since the Code, this action, on account of its nature, is one which must be brought within ten years after the action accrued. An action to enforce an equitable remedy, must be brought within ten years, under section 97 of the Code. ¶

The cognizance of legacies was confined in England to ecclesiastical and equity courts, and the common-law courts did not assume jurisdiction in suits for legacies, except upon an express promise by an

* 2 R. S., 302, §§ 51, 52, 53; *McCartee v. Camel*, 1 Barb. Ch., 455, *supra*; *Clark v. Ford*, 3 Keyes, 373.

† 2 R. S., 801, § 52. ‡ *Willard Eq. Jur.*, 489; *Harris v. Fly*, *supra*. § *Supra*.

| *Supra*. ¶ *Minor v. Beekman*, 50 N. Y., 338; *Hubbell v. Sibbey*, *id.*, 468.

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executor, in consideration of forbearance, * or unless there was evidence that the personal representative held the money, not as executor or administrator, but in his individual character, upon a new contract for a loan of it to him. † But our statute provided that an action might be brought, if there were sufficient assets in the hands of the executor to pay the debts and the legacies; and the Revised Statutes ‡ provide that if there be more than sufficient assets in the hands of the executor or administrator to discharge the debts of the testator or intestate, a legatee, after the expiration of one year from the time of the granting of letters testamentary or administration, and after a reasonable demand made, and on executing a bond such as designated, may commence an action to recover the legacy against the executor or administrator. These provisions conferred jurisdiction upon the common-law courts to entertain actions for legacies against executors and administrators, but this is not such an action. The remedy given against the executor or administrator, therefore, founded upon the statute, is one which must be pursued within six years after the cause of action accrues. § It is based on the assumption that there are sufficient assets to pay the legacy.

When the action is against the devisee of the land charged with the payment of the legacy, or his heirs, as in this case, and not against the executor or administrator, it is, as already stated, one in its nature equitable, and may be commenced at any time within ten years after the cause of action accrues.

If there were, during the six years, sufficient assets in the hands of the executor or administrator to pay the legacy, and such fact were set up as an answer to the claim of the legatee, it would perhaps require the consideration of a question that does not arise here. The action is, as suggested, against the heirs of the devisee, and not against the executor or administrator of the testator. There is no question about the right of the plaintiff to the legacy of Eunice, unless it lapsed. The action as to that was commenced in time.

* *De Witt v. Schoonmaker*, 2 Johns., 243.

† 1 Chitty Pl., 114 (6th Am. ed.); *Rundle v. Allison et al.*, 34 N. Y., 188.

‡ 2 R. S., 114, § 9.

§ *Frost v. Frost*, 4 Edw. Ch., 738; *Clark v. Ford*, *Rundle v. Allison*, *McCartee v. Camel*, *supra*.

It is claimed, however, that no interest should be given. The right to it has been settled. The land of which the defendants became the owners, was charged with the payment of the legacy, and they took it *cum onere*; * and the land yielding profits, the payment of interest upon the legacy is just and reasonable, though not demanded when due. † It should be computed from the 8th May, 1857, which was one year after the death of Eunice.

The testator contemplated that a period of one year should elapse after the legacy became due, before its payment could be enforced.

The judgment must, therefore, be affirmed as to the legacy given to Eunice, and reversed as to the legacy given to Sarah, without costs to either party.

DAVIS, P. J., and DANIELS, J., concurred.

Ordered accordingly.

IN THE MATTER OF THE PETITION OF PATRICK F. CONWAY,
RESPONDENT, v. THE MAYOR, ETC., OF THE CITY OF
NEW YORK, APPELLANT.

Chapter 187 of 1870 — Publication under — Street assessments.

Chapter 187 of the Laws of 1870, does not require that a resolution for the repavement of a street in the city of New York, should be published in more than one newspaper.

APPEAL from an order setting aside and vacating assessments made on the land of the petitioner for the expense of paving Thirty-second street with trap-block pavement, between Second avenue and the East river, in the city of New York.

Wm. Barnes, for the appellant.

James A. Deering, for the respondent.

* Harris v. Fly, 7 Paige, 421.

† Glen v. Fisher, 6 J. Ch., 33; Birdsall v. Hewlett, *supra*.

DANIELS, J.:

The proofs produced upon the hearing of the petitioner's application, showed that a previous pavement had been laid upon Thirty-second street, for which his property had been assessed, and the assessment paid. And, as it was made to appear that the resolution providing for the repavement was not published in all the newspapers employed by the corporation before its final passage or adoption, as required by section 7, of chapter 446, of the Laws of 1857, the assessment, for that reason, was objected to as unlawful. The proof showed a failure to publish in the newspaper called "The Leader," and that, under the act of 1857, has been held to be a fatal defect in other proceedings of this nature.* But it is claimed, on the part of the appellant, that this principle is inapplicable to the present case, for the reason that the resolution for the pavement mentioned, was not finally passed or adopted until after chapter 137, of the Laws of 1870, went into effect, and that a single publication was sufficient to satisfy all that was required by that act. The proof showed that the resolution for the repavement was reported to the board of aldermen, on the 12th day of May, 1870, and passed on the twentieth of the same month; and that it was received by the board of assistant aldermen on the twenty-first, and adopted on the twenty-fourth of that month, while the act of 1870 was enacted and went into effect on the fifth day of April of that year, before the resolution was either voted upon or adopted by either of the boards. That act provided that it should be the duty of the clerks of the respective boards to publish all resolutions and ordinances and amendments thereof, which should be introduced or passed, except such as required secrecy, and that no vote "shall be taken in either board upon the passage of a resolution or an ordinance, which shall contemplate any specific improvement, or involve the sale, disposition or appropriation of public property, or the expenditure of public moneys or income therefrom, or lay any tax or assessment, until after such notice shall have been published at least three days; and whenever any vote shall be taken, such resolution or ordinance shall, before the same shall be sent to the other board, or to the mayor,

* *Matter of Douglass*, 46 N. Y., 42; *Matter of Astor*, 50 id., 363; *Matter of Smith*, 52 id., 526; and *Matter of Phillips*, reported in 2 Hun, 212, and decided in Court of Appeals, February 2, 1875.

and immediately after the adjournment of the board at which the same shall have been passed, be published with the yeas and nays, and with the names of the persons voting for and against the same, as part of the proceedings."*

At the time when the resolution in question was considered, this was the only existing law providing for its publication, for, by the last section of the act containing it, the preceding acts of 1830 and 1857, requiring the publication to be made in all the newspapers employed by the corporation, were expressly repealed. The first of those acts was passed on the 7th of April, 1830; the other on the 14th of April, 1857; and they were repealed by an express reference to those dates, as well as the titles by which they had been enacted.†

Another act was passed afterward, in the same month, having relation to the publication of proceedings in the cases of assessments, but it did not require them to be published, as the statutes which were repealed had, in all the papers employed by the corporation. It merely provided that all advertising for the city government, including street and assessment proceedings, should be done in not more than seven daily and six weekly newspapers, to be designated from time to time by the mayor and comptroller. ‡ The evident object of the enactment was, to have the papers provided, in which the advertising required by other laws and regulations could be done, without in any way attempting to define or describe what that might be. The advertising was to take place in newspapers from time to time to be designated; but nothing appeared, from which it could be supposed that any designation under this provision had been made when this resolution was before either of the boards that considered and passed it, or at any time since then.

When the resolution was voted upon, the proceedings of the boards acting on it were consequently regulated wholly by the act of April 5, 1870, which simply required publication of the proceedings, without stating that it was to be done in all the newspapers employed by the corporation. The change made was both substantial and significant, indicating the existence of the intention to

* Vol. 1, Laws of 1870, 869, § 20.

† Vol. 1, Laws of 1870, 396, § 120.

‡ Vol. 1, Laws of 1870, 882.

dispense with the strictness previously enjoined. The comprehensive term by which the regularity of the proceedings had been rendered dependent on a publication in all the newspapers, was omitted, and the substitution of an indefinite publication was made to take its place. The omission of that term in the present act, was so important as to be consistent with no other design than that of effecting a change in the law. And its existence is fully confirmed by the positive repeal of the laws by which the general requirement had been made.

The act of 1870 contains no declaration of the number of papers in which the publication shall be made, to constitute a compliance with its requirement. But whether it shall be in one, two or more newspapers, was not stated. All that was prescribed was, that there should be the designated publication of the resolution and proceedings, and that can be complied with by making it in one newspaper, as literally and substantially as though it were made in any greater number. In either case a publication would be made, and that is all that the act requires in order to satisfy its terms.

The system provided for by the preceding statutes was exceedingly strict and precise, rendering the proceedings invalid when an accidental omission to publish in one paper occurred, even though no want of notice resulted from it to the owner applying for the removal of the assessment, for the expense of the improvement, from his property. And it was probably for the purpose of removing this special restraint that the change was made, which the language of the act of 1870 indicated it to be the intention to make; no other design can be fairly imputed to its terms. It was obviously insufficient, therefore, to establish a failure to comply with this provision, to show an omission to publish the resolution in one of the four newspapers employed by the corporation for the publication of such proceedings. The act of 1870, which was enacted after the designation was made, did not require a publication in the newspapers previously employed for that purpose. It required only such a publication as its own terms prescribed, and making it in even a single newspaper was sufficient to perform what they declared should be done.

It appeared from the proof produced upon the hearing, that three other newspapers were, in 1868, employed for the publication of

such proceedings, besides the one in which it was shown that it had not been made. No other evidence of the omission to publish was given. And it may very well have been, consistently with this state of the evidence, that the proper publication was made in each one of the other three papers. It could not be reasonably inferred from the omission to publish in one, that the neglect of the prescribed duty had been general. The application made was predicated on the truth of a negative allegation. And it was the applicant's duty to give reasonable evidence of its truth, before he could be entitled to an adjudication in his favor.*

The persons charged with the duty of making publication, were public officers, who, the law presumes, in the absence of evidence to the contrary, performed the obligation imposed upon them. Some proof that they failed to do their duty was required, to overcome the presumption existing in their favor. The clerks of the respective boards were required to publish the resolution and proceedings, and they cannot be held to have failed to do so, without some proof fairly warranting that conclusion; † and none was given, which could be rationally attended with that result.

When the resolution was voted upon, the proceedings of the boards, so far as publication was required, were regulated by the act of 1870, which required a mere publication only, and not that it should be made in all the newspapers employed by the corporation, as the preceding laws had designated. The proof given by the applicant failed to show that this publication had not been made. For that purpose, the proof should have gone further. The omission relied upon could not be established by a simple failure to publish in *The Leader*.

The order appealed from should be reversed, with ten dollars costs besides disbursements, and the motion denied, with ten dollars costs.

DAVIS, P. J., and BRADY, J., concurred.

Ordered accordingly.

* 1 Greenleaf on Evidence (12th ed.), § 80.

† *Hartwell v. Root*, 19 Johns., 845; *People v. Carpenter*, 24 N. Y., 66; *Leland v. Cameron*, 81 id., 115.

FRANK S. BOND, RESPONDENT, v. SAMUEL B. SMITH AND
OTHERS, APPELLANTS.

Action for torts—what actions survive—substitution of personal representatives, and separation into two actions in case of death of one defendant.

Actions for wrongs to the property, rights or interests of another, may be maintained against the executors or administrators of a deceased wrong-doer, when they are not brought for slander, libel, assault and battery, false imprisonment, or on the case for injuries to the person of the plaintiff, or of the testator or intestate of any executor or administrator.

In an action brought against several defendants, to recover damages for fraudulent representations as to, and inducing thereby the purchase of, certain stock, if one of the defendants die, the action is properly separated and continued as two actions, one against the survivors, and the other against the personal representatives of the deceased party defendant.

Where, in such a case, the plaintiff has been partially examined as a witness on the trial before a referee, and such examination is incomplete, an order, providing that every act and proceeding done or taken in the cause previous to the decease of the party defendant shall be valid and of like force and effect in each of the separate actions as if they had been separately brought and prosecuted, is too broad, and should be made without prejudice to an application to strike out such parts of his evidence as would be incompetent as against the personal representatives of the deceased defendant.

APPEAL from an order reviving, separating and continuing an action.

John E. Burrill, for the appellants.

Charles M. Da Costa, for the respondent.

DANIELS, J.:

The action was brought to recover damages claimed to have been caused by fraudulent representations concerning the Clifton Iron Company, by means of which the plaintiff was induced to purchase 1,000 shares of its capital stock.

The defendant William D. Thompson departed this life during its pendency, and the order appealed from revived it by making his executors parties in his stead, and directed its continuance as a separate action as to them.

By statute, actions for wrongs to the property, rights or interest of another, may be maintained against the executors or adminis-

trators of a deceased wrong-doer, where they are not brought for slander, libel, assault and battery, false imprisonment, or on the case for injuries to the person of the plaintiff, or of the testator or intestate, of any executor or administrator.* This action was not within the exception made to the general provision contained in the first section of the statute, and for that reason it did not absolutely abate by the death of the defendant.† The order for the revivor and continuance of the action against the executors of the deceased defendant, was in all respects right and proper.

It further provided for the division or separation of the action, and for its subsequent prosecution as two actions, one against the surviving defendants, and the other against the personal representatives of the deceased defendant. And as the action was for a tort, for which the defendants were separately as well as jointly liable, this portion of the order was well warranted by authority.‡

At the time of Thompson's decease, the plaintiff had been partially examined, as a witness on his own behalf, before the referee to whom the action had been referred. But the examination was then incomplete. The order provided that every act and proceeding, done or taken in the case previous to his decease, should be valid, and of like force and effect in each of the separate actions as if they had been separately brought and prosecuted. The learned counsel for the appellants expressed the apprehension that this might have the effect of preventing the executors from moving to strike out such portions of the evidence given by the plaintiff, as he would not be competent to give against them in their representative capacity. The order is so broad in this respect, that the apprehension may be warranted by its probable effect. In this respect it should be modified by the addition of a provision declaring it to be without prejudice to such a motion, and that will leave the referee at full liberty to dispose of the application, if it should be made, without the least restraint or embarrassment arising out of the effect

* 8 R. S. (5th ed.), 746, §§ 1, 2.

† *Haight v. Hayt*, 19 N. Y., 464; *Byxble v. Wood*, 24 id., 607, 612; *Graves v. Spier*, 58 Barb., 849, 885; *Heinmuller v. Gray*, 13 Abb. (N. S.), 299.

‡ *Union Bank v. Mott*, 27 N. Y., 633; *Gardner v. Walker*, 23 How. Pr., 405; *McVean v. Scott*, 48 Barb., 879; *Heinmuller v. Gray*, 13 Abb. (N. S.), 300; *Arthur v. Griswold*, MS. opinion of Court of Appeals.

of the order. In other respects the order seems to be in proper form, and well warranted by authority.*

With the modification already suggested, the order should be affirmed, with ten dollars costs, besides disbursements, to abide the event of the action.

DAVIS, P. J., and BRADY, J., concurred.

Ordered accordingly.

CHRISTIAN F. A. DAMBMAN, APPELLANT, v. HERMAN SCHULTING, RESPONDENT.

Fraud—release avoided by evidence of—neglect to give such evidence in action brought to recover the debt—action to set aside release cannot thereafter be maintained—Under Code, no reply necessary except to counter-claim.

All controversies respecting the subject-matter of a litigation must be determined in one action, and if the defense of fraud in obtaining a release be not set up in the action brought for the debt, and in which such release is pleaded in bar, an action to set aside such release for fraud cannot be maintained.

Fraud invalidates all instruments, however solemn; and the effect of a release pleaded in an answer to an action prosecuted for the debt, may be avoided by proof that it was fraudulently procured.

Under the Code, no reply to an answer is necessary unless it sets up a counter-claim, but the plaintiff is permitted to prove any matter in denial or avoidance of the answer when it sets up new matter, as the case may require.

APPEAL from an order sustaining a demurrer to the plaintiff's complaint.

W. Watson, for the appellant.

C. B. Smith, for the respondent.

DANIELS, J. :

This action was brought to set aside and annul a release, on the ground of the defendant's alleged fraud in its procurement. It appeared by the complaint, that a preceding action had been

* Moore v. Hamilton, 44 N. Y., 666.

brought for the recovery of the debt, and the release answered as a defense. For that reason the demurrer was sustained. The plaintiff insisted that the decision made was erroneous, for the reason that he could not avoid the effect of the release by proving the fraud in that action. In that the learned counsel for the plaintiff is very clearly mistaken. Fraud invalidates all instruments, however solemn, both at law and in equity. And as no reply is either required or provided for, unless directed by special order of the court, to the defense of a release, the plaintiff may avoid and overcome its effects by evidence showing it to have been procured by fraud. The provision of the Code upon this subject, is, that "the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require." * And it is so broad, that it secures to the plaintiff the benefit of every possible answer to the defense made by way of new matter not constituting a counter-claim, as fully as though it were alleged in the most complete and artistic form. He may avoid it by any evidence properly attended with that result, under the principles of either law or equity. This was held to be the right of the plaintiff under the present system of practice, when a reply was required to new matter in the answer. † And the principle has been held to be equally as applicable since the reply to such a defense has been dispensed with. ‡ In deciding that case, it was stated by Judge LEONARD, who delivered the opinion of the court, that no reply to an answer is necessary, unless it sets up a counter-claim; but the plaintiff is permitted to prove any matter in denial or avoidance of the answer, where it sets up new matter, as the case may require. §

The right of the plaintiff to avoid the release by proof of fraud in the action prosecuted for the recovery of the debt, is further confirmed by the conclusion stated by Judge ALLEN, in deciding the case of *Dobson v. Pearce*, || and which was concurred in by the court, that the intent of the legislature is very clear, that all controversies respecting the subject-matter of the litigation, should be determined in one action, and the provisions of the Code are

* Code, § 168.

† *Phillips v. Gorham*, 17 N. Y., 270.‡ *Sheehan v. Hamilton*, 2 Keyes, 304.§ *Id.*, 306.

|| 2 Kern., 156.

adapted to give effect to that intent. * To the same general effect, also, are the cases of *Crary v. Goodman*, † and *Foot v. Sprague*. ‡

The plaintiff's right to be relieved from the effect of the release on the ground of fraud, was, under these principles, included in the preceding action. This action to secure that result was therefore improper, and the decision sustaining the demurrer to the complaint was right, and should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, with costs.

ABRAHAM NEW, RESPONDENT, v. GEORGE ANTHONY
AND ANOTHER, APPELLANTS.

Inquest — when order opening, directs costs to abide event — effect of such order when less than fifty dollars is recovered.

When an order opening an inquest directs that the costs of the inquest, and ten dollars costs of the motion for such order, abide the event, and upon the final trial, the claim being one which might have been sued upon in the justice's court, the plaintiff recovers less than fifty dollars, he is not entitled to such costs.

APPEAL from an order directing a readjustment of plaintiff's costs.

Henry Whittaker, Jr., for the appellants.

E. Goldsmith, for the respondent.

DANIELS, J. :

The plaintiff in this action recovered a judgment on its trial as an inquest. That, on motion, was vacated, with ten dollars costs to the plaintiff, and the costs of the inquest were ordered to abide the event. Upon the final trial had, the plaintiff recovered less than fifty dollars; and, as the claim was one which might have been sued and tried in the court of a justice of the peace, within the signification of those terms as they are used in the provisions of the Code concerning costs, the defendants, and not the plain-

* 2 Kern., 165.

† Id., 266.

‡ 12 How. Pr., 355.

tiff, were entitled to their costs in the action. They made no claim to the costs of the motion, or of the inquest taken. But the plaintiff claimed that those costs should be allowed to him, because they were made, by the terms of the order, to abide the event of the action, in which he finally recovered a verdict for twenty-four dollars. The order itself gave the plaintiff merely a contingent right to those costs, dependent upon the result of the litigation. And he could only become entitled to recover them by securing such a result as would be lawfully followed by the recovery of costs. As the order did not give him the costs as the result of any recovery in his favor, it must have contemplated such a degree of success as would be attended with the right to costs under the provisions of the law; and that required a recovery of the sum of at least fifty dollars. The law did not interpose for that purpose in his behalf, upon the recovery of anything less than that amount, in an action of this description.* And where that proves to be the case, the provision is absolute, that the costs shall be allowed to the defendant.† These provisions do not support the plaintiff's claim to the allowance of the costs of the inquest and the motion, for the costs they provide for are given to the defendants. There was no such recovery in the action, as extended or vitalized the terms of the order. That rendered the plaintiff's right to costs dependent on such a recovery as should be followed by the costs of the action. And that was not secured by the plaintiff. It was not merely a verdict in his favor that was contemplated, but such a verdict as would give him the right under the law to recover costs. If that had not been the design of the court in making the order, more explicit language on that subject would have been employed.

It is manifest that the court did not regard the plaintiff as having an unqualified right to the costs in question; otherwise they would not have been made dependent upon a future event. By the direction which was given, the event the right depended upon was one which the law provided should be attended with the recovery of costs in the action. Nothing less than that could have been designed to give the plaintiff the full benefit of what the order itself did not provide he should have. No decisive authority has been found upon this subject, but, so far as they apply to it at all, the following

* Code, § 304.

† Code, § 305.

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cases support the conclusion already mentioned: *Gildart v. Gladstone*, * *Bull v. Ketchum*, † *Koon v. Thurman*. ‡ It was claimed that the order was not appealable, but, under the rule which is now well established, that position is untenable. §

The order should be reversed and the motion denied, but, under the circumstances, without costs.

DAVIS, P. J., and BRADY, J., concurred.

Order reversed and motion denied, without costs.

HENRY L. BUTLER AND OTHERS, APPELLANTS, v. LOUISA DOUAI WEHLE, IMPEADED, ETC., RESPONDENT.

Remedies — election of — Attachment — Action in equity to set off debt against judgment.

Where a party against whom a judgment has been recovered commences an action against his judgment creditor for the purpose of recovering a claim existing in his favor against such judgment creditor, and in such action issues an attachment and by virtue thereof attaches such judgment, he is precluded, while the suit in which such attachment issued is pending, from maintaining an action in equity to apply the debt sued on in such action as a set-off against the judgment recovered against him.

APPEAL from order denying a motion to continue an injunction.

On May 26, 1871, Mrs. Wehle recovered a judgment against Butler, Broome & Clapp, the plaintiffs, for \$5,287.44, in the Superior Court of the city of New York, on which an execution was issued.

The defendant, Mrs. Wehle, was indebted to Butler, Broome & Clapp, the plaintiffs, and in December, 1869, a suit was commenced, and is still pending, in the New York Common Pleas, in favor of the plaintiffs and against her, to recover that debt.

On the 1st of November, 1874, attachments were issued in said action from the Court of Common Pleas in favor of the plaintiffs

* 12 East, 668.

† 2 Denio, 188.

‡ 2 Hill, 357.

§ *Security Bank v. National Bank of Commonwealth*, 9 N. Y. Sup. Ct. (2 Hun), 287, and cases cited.

therein, which attachments were served on Butler, Broome & Clapp, and their said indebtedness to Mrs. Wehle on said judgments was duly attached by the sheriff.

This action was brought to restrain the defendant from collecting the amount of her judgment against the plaintiffs; and a preliminary order and injunction were granted herein, but the injunction not continued on the return day of the order to show cause accompanying it.

Stephen W. Fullerton, for the appellants. That a claim, not in judgment, against an insolvent may be set off by a court of equity against a judgment in favor of the insolvent, is an ancient and well recognized ground of original equity jurisdiction. (Waterman on Set-off [2d ed.], pp. 18, 19 and 20; p. 84 and note; p. 124 and note; p. 184 and note, and pp. 450 to 465, and cases there cited; *Lindsay v. Jackson*, 2 Paige, 581; *Gay v. Gay*, 10 id., 369; *Simpson v. Hart*, 14 Johns., 63; *Smith v. Felton*, 43 N. Y., 419; *Zogbaum v. Parker*, 55 id., 120; *Rose v. Hart*, 2 Smith's Lead. Cases, 309; *Pond v. Smith*, 4 Conn., 297; *Robbins v. Holley* [Court of Appeals, of Kentucky], 1 Monroe, 191; *Wolcott v. Sullivan*, 1 Edw. Ch., 399; *Matter of Globe Ins. Co.*, 2 id., 625; *White v. Wiggins*, 32 Ala., 424; *Merrill v. Souther*, 6 Dana, 305.) The insolvency of the party against whom the set-off is claimed, is a sufficient ground for the exercise of the jurisdiction of a court of equity in allowing a set-off in cases not provided for in the statute, although the demands are not in judgment. (*Gay v. Gay*, 10 Paige, 369; *Lindsay v. Jackson*, 2 id., 581, and cases there cited.)

Chas. Wehle, for the respondent. The court was right in refusing to continue the injunction, as a continuance of it would be an interference with the process of a court of co-ordinate jurisdiction. (*Bagg v. Jefferson*, 10 Wend., 615.) Assuming, for the sake of the argument, that this court had the right to prevent another court of co-ordinate jurisdiction from exercising its lawful jurisdiction in a suit therein pending, it ought not to exercise that right to offset a simple debt against a judgment. (*Dunkin v. Vandenberg*, 1 Paige, 622; *Harris v. Palmer*, 5 Barb., 105; Waterman on Set-off, §§ 323, 332.) The pretended set-off is already secured to the plaintiffs by attachments levied at their instance on defendant's property.

DANIELS, J. :

The substantial relief demanded by the plaintiffs in this action, is the set-off of a demand claimed to exist in their favor against a judgment recovered by the defendant against them, and which she endeavored to collect by execution. Before the commencement of the suit, another action was commenced by them against her for the recovery of the debt relied upon as a set-off. In that action, according to the sworn answer of the defendant, an attachment was issued in the plaintiffs' favor, and the judgment was attached by virtue of it.

The affidavit of Mr. Crosby, one of the plaintiffs' attorneys, admits the issuing of the attachment, without denying the seizure of the judgment under it. In this state of the case, it may, therefore, be assumed that the statement of that fact in the answer, verified by the affidavit of the defendant's attorney, is true. It is entirely clear, that if the suit in which the attachment has been issued shall proceed to judgment, the plaintiffs will be able to satisfy their debt by means of the seizure of the judgment recovered by the defendant against them. And that would constitute a complete defense to the present action, to apply it toward the partial extinguishment of the same judgment, as an equitable set-off.

A similar consequence would result from a judgment in the plaintiffs' favor in this action. After that, the right to proceed under the attachment would be determined. It is entirely apparent from these facts, that both remedies cannot be at the same time prosecuted and enforced by the plaintiffs. They are inconsistent with each other. And beyond that, one is legal, and the other is equitable. The policy of the law is opposed to such proceedings. It does not allow one party to vex and harass another with two different and inconsistent proceedings, carried on at the same time, to produce what in substance must be the same result. A different practice would be unreasonable as well as oppressive, and the law will not permit it.*

The plaintiffs elected to proceed by virtue of their attachment previously issued in an action for the recovery of their debt. And while that proceeding is pending, they are concluded by that election from maintaining an action, afterward commenced in equity, to

* *Livingston v. Kane*, 3 Johns. Ch., 224; *Sanger v. Wood*, id., 416.

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apply the debt as an equitable set-off toward the satisfaction of the judgment recovered against them. *

For that reason the plaintiffs had no right to an injunction restraining the enforcement of the judgment against them in this action. The order should be affirmed, with ten dollars costs besides disbursements.

DAVIS, P. J., concurred.

Ordered accordingly.

JOHN GRAY AND ANOTHER, RESPONDENTS, v. THOMAS GANNON, APPELLANT.

Ambiguity as to order for shipment—explained by course adopted under prior shipment under the same contract—Substantial performance—when sufficient.

For the purpose of explaining an ambiguity in an order relating to the shipment of an engine, evidence may be given of the course adopted and approved of in the prior shipment of another engine under the same contract.

The performance of an agreement must be such as is required by the true spirit and meaning of the contract, and the intention of the parties. A substantial performance is all that is required, unless it be expressly stipulated otherwise, when the party receiving it will derive from it all the benefits that would have resulted from a literal performance, and in practically the same way.

APPEAL from a judgment recovered on a trial at the circuit.

S. C. Conable, for the appellant.

Wm. F. Shepard, for the respondents.

DANIELS, J.:

The plaintiffs recovered a verdict for \$500 and interest, upon an order drawn in their favor by Brooks, Bacon & Co. upon the defendant, and accepted in writing by him. By the terms of the order, the defendant was requested by its drawers to accept from the plaintiffs the twenty horse power hoisting engine made for

* *Goss v. Mather*, 2 Lans., 283; *Rodermund v. Clark*, 46 N. Y., 354.

Messrs. A. Thomson & Co., New Orleans, and pay the amount of the contract, \$735; \$500 on delivery on board in New York, and the balance, \$235, as soon as word was received from Thomson & Co., and charge to account of the drawers.

The order was indefinite and uncertain in its description of the manner in which the delivery of the engine on board was to be made to constitute a compliance with its terms; and to ascertain the intention of the parties to it on that subject, evidence was offered and received to show their understanding, as that was exhibited in what had passed between them, and the course that was adopted and approved of in the shipment of a preceding engine manufactured for Thomson & Co. under the same contract. From that, it appeared that the other engine was shipped to Thomson & Co. at New Orleans, by the plaintiffs, in the defendant's name as the shipper, or consignor, and that the engine mentioned in the order was designed to be sent in the same way. That was the delivery on board mentioned in, and imperfectly expressed in, the order accepted by the defendant. And the evidence was proper for that purpose.* The exceptions taken to the rulings admitting it, were therefore properly overruled.

After the order was drawn and accepted, the plaintiffs delivered the engine on board the steamship *Cortes*, at New York, consigned to Thomson & Co. at New Orleans. The bill of lading was in the form ordinarily used, and similar in all respects to the one under which the first engine was sent, except that it named the plaintiffs instead of the defendant as the shippers, or consignors. Upon that and the order, they applied to the defendant, for payment of the \$500. He refused to pay; and the evidence tended to show that he placed such refusal on the failure to name him as consignor of the engine in the bill of lading. Further evidence was given, tending to show that the bill of lading was offered and tendered to the defendant both before and after the steamer sailed, and that on its surrender by the defendant, no difficulty would have been encountered in procuring another in its place, containing the defendant's name as the shipper.

By the omission to have the defendant named in the bill of lading as the shipper of the engine, the plaintiffs were involved in

* *Grierson v. Mason*, 3 N. Y. Sup. Ct. R., 185.

what was a literal failure to perform in the manner agreed upon between the parties. And if they were bound to show such a compliance before they could recover the first payment mentioned in the order, then the judgment rendered in their favor cannot be sustained. But a literal performance of the condition on which the right to payment is rendered dependent, is not always required to entitle the claimant to recover. For that purpose, a substantial performance has, in some cases, been deemed to be sufficient. Parties may, by the terms of their agreement, render the right to payment dependent on the literal performance of an act on the part of the person to receive it. And where that appears to be the case, it can be no otherwise recovered, where no dispensation of the condition may exist, than by showing such a performance as the agreement in terms requires. But this is not a case of that description, for it was not specifically agreed, at any time, that the plaintiffs should only be paid on the production of a bill of lading showing a shipment of the engine by the defendant. What in effect was agreed upon, was, that the engine should be delivered on board a steamer at New York, for Thomson & Co., at New Orleans, as the preceding engine had been sent. That had been manufactured for them, and was to be delivered so that it would be carried and transported to them at their place of residence. And before the manufacturers could require payment under the terms of the order, it was necessary that a delivery should be shown that would be attended with that result. The defendant was, in fact, the agent of Thomson & Co., and whatever he did in reference to the property, was for the purpose of promoting that object. He had no interest in it different from them; but his control over it was restricted to that disposition of it. And, for that purpose, a shipment in the name of the plaintiffs, as consignors, was just as effectual as one made in the name of the defendant. The property was as sure to be safely transported under one name as it could have been under the other. It was objected that it could not be insured as well; but that is very clearly a mistake; the title and interest of the consignees would be the same in either case. And, for that reason, it could be insured the same with the plaintiffs' name as consignors, as though the bill of lading had acknowledged its receipt from the defendant.

Not the slightest difficulty could be occasioned in that respect, by the circumstance that the bill of lading named the plaintiffs instead of the defendant as the shippers. The delivery was made substantially in the manner contemplated by the agreement and the terms of the order. For it placed the engine on its transit to the purchasers, and no more than that would have been done if it had been sent in the name of the defendant as shipper. It was a substantial compliance with an agreement containing no explicit stipulation that payment should only be made on performance of a different description. And that was sufficient to perform the obligation of the plaintiffs, as long as it was made to appear by the evidence, and found by the jury, that the bill of lading actually taken by the plaintiffs was offered and tendered to the defendant when payment was applied for on the order. The rule upon this point has been stated to be, that the performance must be such as is required by the true spirit and meaning of the contract, and the intention of the parties, as expressed therein. A mere literally accurate performance may wholly fail to satisfy the true purpose of the contract, and such a performance is not enough, if the true purpose of the contract can be gathered from it, according to the established rules of construction.* The performance which was shown and offered by the plaintiffs was substantially all that could be required from them, and it secured to the consignees and the defendant all the benefits and advantages which would have been derived from that which he insisted upon, and practically in the same way. The exceptions which were presented to the charge and the refusal to charge, requiring a literal performance to be shown on the part of the plaintiffs before they should be allowed to recover the first installment mentioned in the order, for these reasons are incapable of being maintained.

The defendant alleged and proposed to prove by way of defense, that the engine was defectively constructed, and that it would require the expenditure of a considerable sum of money to put it in the condition required by the contract made for it. This defense was excluded by the court, and the defendant excepted. The engine was in fact constructed under a contract, but it was not

* 2 Parsons on Contracts (5th ed.), 656; 1 Story on Contracts (4th ed.), 36, 37, § 32; Sinclair v. Tallmadge, 35 Barb., 602.

made with the plaintiffs. It was between Thomson & Co. and Brooks, Bacon & Co. The plaintiffs were not parties to it, nor to any other contract with Thomson & Co., or with the defendant, beyond that for the delivery of the engine as it had been manufactured. If any claim for compensation existed, under the contract made, for the imperfect construction of the engine, it was against Brooks, Bacon & Co., who alone had agreed that it should be built in the manner claimed by Thomson & Co. The plaintiffs constructed it for Brooks, Bacon & Co., and under their employment; and when it was completed, and before the order on the defendant was drawn and accepted, Mr. Bacon of that firm examined and accepted it, and notified the defendant that he had done so, and had found it complete and ready for shipment, as ordered by Mr. Thomson. That showed a full performance of the plaintiffs' obligations, as the manufacturers, to the satisfaction of the persons who had employed them; and for that they were then entitled to payment from Brooks, Bacon & Co. There was no ground on which that could be successfully resisted, simply because the contract between Brooks, Bacon & Co. and Thomson & Co. had not been performed according to its terms. If that were true, it constituted a good claim for remuneration against Brooks, Bacon & Co., but not against the plaintiffs.

It was to pay the plaintiffs what had become due to them for constructing the engine, that the order in suit was drawn and accepted. And by that the defendant agreed to pay them the first installment of \$500, when the engine, as it then was made, should be delivered on board at the city of New York. He did not qualify his obligation by requiring, as a condition on which the right to payment should depend, that the engine should be found to be manufactured as the contract between Thomson & Co. and Brooks, Bacon & Co. required it to be. But his undertaking was absolute to pay on its delivery on board a steamer for Thomson & Co. As the indefinite and incomplete terms of the order were rendered intelligible and effectual by the other evidence in the case, and as that was substantially performed by the plaintiffs, they became entitled to the payment the defendant had agreed in that event to make to them. The case presented a simple question of fact, and that was fairly submitted to the jury. There was no error in any

of the rulings made by the court, and the judgment should, therefore, be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

GEORGE W. MILLER, APPELLANT, v. JOHN P. WHITE AND
OTHERS, RESPONDENTS.

Complaint — defective as not stating cause of action — how cured by answer.

Where a complaint simply alleges an indebtedness to exist without stating the facts necessary to show such indebtedness, but an answer is put in, stating the matter so omitted in the complaint, and the case has been tried, and, on appeal, a new trial ordered, the court will not, on such new trial, dismiss the complaint on the ground that it does not state a cause of action.

In such case, when the answer alleges that the indebtedness referred to in the complaint accrued for work and labor performed, and proceeds to disclose facts rendering the contract void as against public policy, the complaint and answer sufficiently present the plaintiff's case, and if the contract is not void as against public policy, or for some other valid reason, all that is required to justify a recovery appears by the pleadings.

APPEAL from an order dismissing plaintiff's complaint on the ground that the facts set forth in it did not constitute a cause of action.

The action was brought to charge the defendants as trustees of the Gutta Percha Manufacturing Company, a corporation created under the general law of this State,* for an indebtedness of that company, to the plaintiff, upon which a judgment was recovered against the company, in 1865, on the ground that the defendants had failed to file and publish in January, 1865, the report required by the statute.

The complaint set forth the recovery of a judgment against the

* Chap. 40, Laws of 1847.

company, that execution was returned unsatisfied, and that the said judgment was unpaid and in full force.

Robert Sewell, for the appellant.

H. Sheldon, for the respondents.

DANIELS, J. :

The action was brought against the defendants, as trustees of the Gutta Percha Manufacturing Company, a corporation created under the laws of this State for the formation of corporations for manufacturing, mining, mechanical and chemical purposes. They were prosecuted under the provision of the statute rendering the trustees of those corporations liable personally for debts owing, for failing to make, publish and file their report.*

The complaint seems to have been sufficient in all respects, except that relating to the nature of the plaintiff's demand. As to that, it was framed on the mistaken theory that the recovery of a judgment against the corporation was necessary, before an action could be maintained against the trustees. And for that reason the usual allegations describing the demand sued for, were probably omitted. Both parties appear to have been involved in the same mistake, as to the necessity of a preceding recovery against the corporation. And the defendant therefore fully answered the defective complaint, and in doing so described what the plaintiff had omitted to state : the consideration out of which the demand was supposed to have arisen. Upon the issue so framed the action was tried and determined in favor of the plaintiff, and a new trial ordered on the reversal of the judgment by the Court of Appeals. After so much litigation in the case, there can be no reason for believing that the defendants can be misled as to the nature or description of the claim made against them. Their protection, therefore, does not require a dismissal of the complaint at the present stage of the proceeding.

The plaintiff averred that the company was indebted unto him, on the 1st of June, 1865 ; and then stated that he recovered a judgment against the company on the debt, on the 27th of June, 1866, for the sum of \$24,734.62, which remained wholly unpaid.

* 8 N. Y. Stats. at Large, 735, § 12.

This, though not a direct, was an argumentative allegation that the plaintiff had such a demand against the company on the 1st of June, 1865. Standing by itself, the cause of action was not probably sufficiently stated to be good against a demurrer. But the defendants, by their answer, alleged that the judgment was founded upon a claim for work, labor and services, done and performed by the plaintiff in procuring contracts for supplies from the government of the United States, and then proceeded to disclose facts rendering the contracts void as against public policy. The averment that the pretended debt accrued for work and labor performed by the plaintiff, supplied the substantial defect existing in the complaint; and, together with the defenses presented against its recovery, created a substantial issue of fact for trial in the action. The answer and the complaint together, sufficiently presented the plaintiff's case to show what his cause of action was. And if the contract shall not be shown by the defendants to be void as against public policy, or for some other valid reason, all that will be required to justify a recovery, appears by the pleadings. The defect in the complaint was cured by the answer. Both, taken together, showed that the plaintiff claimed to have a debt against the company for the amount mentioned, and the answer stated it to be for labor and services performed by him. These facts, with those showing the defendants to have been at the time trustees who failed to make the report required from them by the statute, constituted a cause of action against them. The order dismissing the complaint was wrong, and it should be reversed, with ten dollars costs besides disbursements.

DAVIS, P. J., and BRADY, J., concurred for reversal for the reasons stated by DANIELS, J., and also on the ground that the practice adopted in moving to dismiss the complaint was altogether irregular.

Ordered accordingly.

MEMORANDA

OF

CASES NOT REPORTED IN FULL.

IN THE MATTER OF THE APPLICATION OF EDWARD SCHELL,
TRUSTEE, ETC.

*Reasonable compensation, to trustee — construction of words — statutory commissions
not proper measure.*

When the creator of a trust expressly provides that the trustee shall have a reasonable compensation for his services, the compensation must be determined with reference to the special circumstances of the estate and the services performed. *

The statute regulating the commissions of executors, etc., does not apply to such a case.

APPEAL from an order made at Special Term, making an allowance to the trustee above named for his services, and confirming the report of the referee on the accounting before him. The *cestui que trust* objected to the allowance of \$1,500 to the trustee, in addition to an allowance of five per cent for collecting the rents of real estate, and the question presented on this appeal was, whether the allowance was unreasonable.

Wm. C. Traphagen and Enoch L. Fancher, for the trustee.

B. F. Dunning, for the appellant.

Opinion by BRADY, J.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Order affirmed, with ten dollars costs besides disbursements.

* In the Matter of E. Schell, etc., 53 N. Y., 263.

CHARLES P. HUNTINGTON AND ANOTHER, APPELLANTS, v.
WILLIAM B. DINSMORE, PRESIDENT, ETC., OF THE ADAMS
EXPRESS COMPANY, RESPONDENT.

Receipt of express company — effect of.

In the absence of fraud or imposition, the receipt delivered by the agent of an express company to the person shipping a package must be held to be the contract between the parties.*

It is immaterial whether or not the amount paid by the agent of the shipper was more or less than the usual charge for carriage.

APPEAL from a judgment in favor of the defendant, entered upon a verdict directed by the court.

E. Terry, for the appellants.

M. Da Costa, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

GEORGE, THE COUNT JOANNES, RESPONDENT, v. LOUIS J.
JENNINGS AND GEORGE JONES, EDITOR AND PUBLISHER
OF THE "NEW YORK TIMES" NEWSPAPER.

Libel — truth of allegations — bar to suit in civil actions — Motive immaterial — otherwise in criminal prosecutions — State Cons., art. 1, sec. 8 — Motion for a new trial — ground of, should be stated.

It is not error to deny a motion for a new trial when no grounds for it are stated; nor will the appellate court entertain questions raised there for the first time.

* *Belger v. Dinsmore*, 51 N. Y., 166; *Collender v. Dinsmore*, 55 id., 200; *Wetzell v. Dinsmore*, 54 id., 496; *Magin v. Dinsmore*, Court of Appeals; *Long v. N. Y. C. R. R. Co.*, 50 N. Y., 76; *Root v. Great W. R. R. Co.*, 45 id., 524; *Reed v. U. S. Ex. Co.*, 48 id., 462; *Babcock v. The L. S. & M. S. R. R.*, 49 id., 491; *Breese v. The U. S. Telegraph Co.*, 48 id., 182.

The constitutional provision (§ 8, art. 1) that, in cases of libel, "if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted," applies only to criminal prosecutions.

In civil actions, where the truth of the alleged libel is pleaded in justification, it may be proved as a complete bar to the suit. In such cases the motive with which the publication was made is not material. *

The rule is the same in slander cases. †

APPEAL from a judgment entered on a verdict, and from an order denying a motion for a new trial. This action was brought to recover damages of the defendants for the publication of an alleged libelous article concerning the plaintiff in the New York Times, of January 27, 1871.

Hamilton Cole, for the appellants.

George, the Count Joannes, respondent in person.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Judgment reversed and a new trial ordered, with costs to abide the event.

JAMES V. SCHENCK, APPELLANT, v. DANIEL P. INGRAM, JR., AND OTHERS, RESPONDENTS.

Receiver — payment by, of unfounded claims — confirmed by order of the court — remedy of creditor.

When the evidence establishes the fact that claims, allowed and paid out of funds in the hands of a receiver by an order of the court, are fictitious and unfounded, the proper proceeding by a creditor of the fund is to apply to be made a party to the suit in which the order was made, and to have such order vacated; for in such proceeding the court has a wider discretion and greater power for relief than in an independent action depending for its success upon satisfactory proof of fraud.

*Root v. King, 7 Cow., 619; S. C., 4 Wend., 118.

†Baum v. Clause, 5 Hill, 196.

APPEAL from an order denying a motion to have certain orders, directing the distribution of funds in the hands of a receiver, and discharging such receiver, set aside and vacated.

The defendant Ingraham was appointed receiver in an action to settle up certain partnership affairs, and paid, as was claimed on this application, and as the General Term was of opinion, exorbitant fees to his counsel, and retained an improper sum for his own services, which acts were done, as the plaintiff claimed, in pursuance of a fraudulent agreement between the receiver and his counsel.

Adam C. Ellis, for the appellant.

John E. Burrill, for the respondent Ingraham.

Opinion by DANIELS, J.

DAVIS, P. J., concurred.

Judgment affirmed, with costs.

ANNA K. GILMAN, APPELLANT, v. THEOPHILUS GILMAN,
RESPONDENT.

Discretionary power in executors — must be exercised by majority.

Where a discretionary power is given to executors to withhold payments to certain children of the testator, it must be exercised by a majority of the executors.

APPEAL from an order of the surrogate of the county of New York, directing the payment of \$25,000 to the respondent, as part of his residuary interest in the estate of the testator. The payment was opposed by one of the then executors: 1st. Because she thought it desirable that the payment should be deferred, the testator having given a discretionary power to his executors to withhold payment from his children, for a suitable period beyond the age of twenty-five years; 2d. That the amount would, with what the respondent had already received, exceed what had been paid to the other legatees, which was denied by the respondent. The court modified the order by reducing the amount to \$17,000.

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E. C. Benedict, for the appellant.

Charles H. Glover, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Order modified by reducing amount to \$17,000, and as thus modified affirmed, without costs to either party.

THOMAS D. PENFIELD, GUARDIAN, ETC., RESPONDENT, v.
SARAH JAMES AND OTHERS, APPELLANTS.

Retaxation of costs — laches.

The plaintiff's bill of costs was adjusted by the clerk on default, after due notice, in January, 1872. In November, 1872, the appellants noticed a motion for readjustment, which was heard at Special Term on the 12th of December, 1872, and denied. *Held*, that the delay in making the motion, for which no excuse was shown, was so great, that the motion was properly denied on the ground of laches.

APPEAL from an order denying a motion for a readjustment of costs.

Edward D. James, for the appellants.

Cyrus Lawton, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with ten dollars costs besides disbursements.

ANNA K. GILMAN, EXECUTRIX, ETC., APPELLANT, v. WIN-
THROP W. GILMAN AND OTHERS, RESPONDENTS.

APPEAL from an order of the Surrogate's Court of the county of New York, directing payment of the sum of \$4,000 to Charles H. Glover, \$6,000 on account of a balance agreed to be due Winthrop

W. Gilman, and the further sum of \$20,000 on account of his distributive share in the estate of the testator.

The testator was a man of large wealth, and by his will directed the final residue of his estate to be divided equally among his children — surviving children — and the heirs of his three deceased daughters. The appellant and the respondent Winthrop W. Gilman are two of the testator's children. Since the testator's decease, a partial distribution of the residue of the estate has been made, under the sanction of the surrogate, to several of the residuary legatees. Among them the appellant has been a participant to a greater extent than the amount directed to be paid by the executors to Winthrop W. Gilman on account of his residuary share.

The amount of the residue appeared to this court to have been entirely ample for the payment of the sums directed to be paid out of it, without, in any respect, endangering the payment of any other lawful claims which might be made against it. For that reason, and the further one that the amount directed to be paid would give Winthrop W. Gilman no more than most of the other residuary legatees had received, the General Term considered that the order in that respect was entirely equitable.

The objection made by the appellant to the order directing the payment, chiefly depended upon a clause contained in the testator's will, declaring that Winthrop W. Gilman should have no portion of his share of the estate until he fairly accounted for and settled the amount charged on the testator's books against him for money advanced and interest upon it. This was met by the fact, that it appeared that a majority of the executors had settled the account with him, with the approval of the surrogate, and had allowed a balance of \$6,000, mentioned in the order, in his favor, which this court considered binding on the estate.*

E. C. Benedict, for the appellant.

Charles E. Whitehead and *Charles H. Glover*, for the respondents.

Opinion by DANIELS, J.

* *Murray v. Blatchford*, 1 Wend., 583, 616; *Chouteau v. Suydam*, 21 N. Y., 179, 184.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Order affirmed, with ten dollars costs and disbursements to the respondents.

THE BOARD OF SUPERVISORS OF THE COUNTY OF
NEW YORK, RESPONDENT, v. GEORGE S. MILLER, APPELLANT.

*Substitution of name of new party plaintiff in proceedings already had in an action —
when not authorized.*

APPEAL from an order amending the summons, complaint, pleadings and proceedings, by substituting as plaintiff the mayor, aldermen and commonalty of the city of New York, in place of the board of supervisors of the county of New York.

The General Term was of opinion that, by providing for a change in the name of the plaintiff, in the summons, pleadings and proceedings, more was done than either the provisions of the Code under which the motion was made, or chapter 304 of the Laws of 1874, creating the newly consolidated corporate body, permitted. That the order should have been limited to a substitution of the consolidated city and county for the board of supervisors, and the future prosecution and continuance of the action in the name of the mayor, aldermen and commonalty of the city of New York. And for the reasons given in the action against Tweed,* it should be so far modified as to produce those results; and as thus modified, affirmed.

David Dudley Field and *Elihu Root*, for the appellant.

Wheeler H. Peckham, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed as modified.

* See 3 Hun, 682.

JACOB F. OAKLEY, AS ASSIGNEE, ETC., APPELLANT, v. THE MAYOR, ETC., OF THE CITY OF NEW YORK, RESPONDENT.

APPEAL from a judgment entered upon an order of the court at Circuit, dismissing the complaint. The action was brought by plaintiff to recover for services rendered to the defendant, which the court was of opinion were included in his duties as clerk to the board of aldermen, in which position he received a fixed salary. The case was decided upon the authority of the cases of *Collins v. The Mayor, etc.* (3 Hun, 680), and *Cowan v. The Mayor, etc.* (id., 632). The court also citing Dillon on Municipal Corporations (§§ 172, 173, vol. 1, p. 290 [2d ed.]); *Heslep v. Sacramento* (2 Cal., 280); *Hatch v. Mann* (15 Wend., 44); *Palmer v. The Mayor* (2 Sandf., 318); *People ex rel. Phenix v. The Supervisors of New York* (1 Hill, 362); *Mallory v. Supervisors of Cortland Co.* (2 Cow., 531); Laws of 1857 (ch. 446, § 46).

J. H. Dukes, for the appellant.

D. J. Dean, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Judgment affirmed.

ELIAS KAHN, APPELLANT, v. ADAM NORRIE, IMPLEADED, ETC., RESPONDENT.

Disbursements — Stenographer's minutes.

APPEAL from an order made at Special Term, directing the clerk to tax the fees of the stenographer for a copy of his minutes, as a necessary disbursement in favor of respondent.

The court, after an examination of the affidavits, concluded that the respondent, not having ordered the minutes from day to day, and not having appealed, and there not appearing in the facts

anything making the copy of the minutes necessary in his proceedings in the action, reversed the order, with ten dollars costs, besides disbursements, and directed that the motion below be denied, with ten dollars costs, such disbursements to be adjusted by the clerk, and, with the costs allowed, to be set off against those of defendant, Norrie, already adjusted. The court did not consider the question whether, in any event, it would be a proper disbursement, under section 256 of the Code.

Elias J. Beach, for the appellant.

Knox & Mason, for the respondent.

Opinion by DAVIS, P. J.

DANIELS, J., concurred.

BRADY, J., concurred, "inasmuch as the minutes do not appear to have been ordered from day to day during the trial, and because the defendant, Norrie, having succeeded, the notes were not then necessary, the plaintiff not having appealed."

JOSEPH B. MANTON, APPELLANT, v. JOHN F. CABOT
AND OTHERS, RESPONDENTS.

APPEAL from a judgment in favor of the defendants, entered on a nonsuit directed at the Circuit.

The action was brought to recover moneys agreed to be paid to the plaintiff for negotiating a contract for the defendants. The only question in the case was, whether the plaintiff was entitled to the money as soon as the contract was made, or only upon payment to the defendant of the money due thereunder. The court *held* the latter to be the correct construction of the contract; and, as the money had not been received by the defendants, *held* that the plaintiff was properly nonsuited.

John S. Washburn, for the appellant.

Wm. W. MacFarland, for the respondents.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

THE BOARD OF COMMISSIONERS OF PILOTS, APPELLANT, v. PAUL N. SPOFFORD AND OTHERS, EXECUTORS, ETC., RESPONDENTS.

Extra allowance — Laches.

REARGUMENT of an appeal from an order of Special Term, granting an additional allowance.*

Although there are questions in a cause making it a difficult and extraordinary one within the meaning of the Code, yet if all these questions are decided in favor of the plaintiff, if the defendant succeeds in the case an additional allowance should not be granted to him for having contested questions upon which the plaintiff has succeeded. When defendants had adjusted their costs on appeal, the General Term disallowed certain costs, and on further appeal the Court of Appeals held that they had been properly allowed; no extra allowance having been asked for or granted, it was *held*, that the defendants could not abandon the bill of costs thus adjusted and served, and commence *de novo* for the purpose of seeking an allowance.

Wm. Allen Butler, for the appellant.

William G. Cooke, for the respondents.

Opinion by DAVIS, P. J.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Motion denied, with ten dollars costs.

* Reported before, 3 Hun, 52, 57.

ELIZABETH M. MOFFETT, RESPONDENT, v. IRA B.
TUTHILL, IMPLEADED, ETC., APPELLANT.

APPEAL from an order at Special Term, continuing an injunction restraining the defendant Tuthill from proceeding with an action to foreclose a mortgage on plaintiff's land. It was alleged in the complaint in the present action, that after the mortgage was given, for the foreclosure of which the action was brought by the defendant Tuthill, an agreement had been entered into by which certain property was to be sold by the defendant Tuthill, and one Dean (not a party to the foreclosure suit), and the proceeds applied on the mortgage held by Tuthill. It further alleged that sufficient property had been sold to pay said mortgage, and asked for an accounting as to the proceeds of the personal property, and on application at Special Term, an injunction order was granted staying further proceedings in the foreclosure suit. The court at General Term was of opinion that the right of the suitor to the injunction in such a case was no longer an open question, and whether it should be granted or not rested in the discretion of the court at Special Term. * That the defendant Dean, not being a party to the foreclosure suit, could not be held responsible in that suit for any abuse of his trust; and that an accounting being evidently necessary in this case to settle the rights of the parties, it should be had in an action in which Dean was a party.

Miller & Tuthill, for the appellant.

Skinner & Wood, for the respondent.

Opinion by BRADY, J.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Order affirmed with ten dollars costs and disbursements.

* *Erie Railway Company v. Ramsey*, 45 N. Y., 637.

WILLIAM REDMOND AND ANOTHER, RESPONDENTS, v.
WILLIAM HOGE AND OTHERS, APPELLANTS.

MOTION for a reargument.

The decision of the General Term in this case is reported in 10 Supreme Court Reports (3 Hun), 171.

The motion was denied on the ground that the points urged upon the court were covered on the former argument, and that, under the peculiar circumstances of the case, a modification of the order might operate prejudicially to the relief sought by the complaint.

John E. Burrill, for the motion.

Henry Nicoll, opposed.

Opinion by DAVIS, P. J.

DANIELS, J., concurred.

Present — DAVIS, P. J., DANIELS and BEADY, JJ.

Motion denied, with ten dollars costs.

JACOB VOORHIS, JR., RESPONDENT, v. THE MAYOR, ETC.,
OF THE CITY OF NEW YORK, APPELLANT.

APPEAL from a judgment in favor of the plaintiff against the defendant, entered on the report of a referee, for services in regulating and grading First avenue.

The court was of opinion that that portion of the work done, for which this recovery was had, was not included in the work which, under the terms of the contract entered into between the parties, the plaintiff was to perform, the excavation not being within the lines of the street; and that if it was incidental to such work pro-

vided for in the contract, that instrument expressly provided that it was to be done without additional compensation.

Richard O'Gorman, for the appellant.

John E. Develin, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed and a new trial ordered, with costs to abide the event.

JOHN A. GRAY, RESPONDENT, v. SAMUEL W. GREEN AND
OTHERS, APPELLANTS.

Injunction.

APPEAL from an order appointing a receiver of a note of \$19,500, and prohibiting and restraining the defendants, their agents, etc., from assigning, transferring, incumbering or disposing of certain personal property, on which plaintiff claimed to have a lien, to secure the payment of moneys claimed to be owing to him.

The court, after considering the evidence, was of opinion that it did not justify the granting of the injunction, and reversed the order appealed from, with ten dollars costs, besides disbursements, and denied the motion, with ten dollars costs.

Dickerson & Beaman, for the appellants.

John E. Burrill, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Order reversed, with ten dollars costs besides disbursements, and motion denied with ten dollars costs.

EDWARD MATTHEWS, RESPONDENT, v. BENEDICT
MEYBERG AND OTHERS, APPELLANTS.

APPEAL from a judgment in favor of plaintiff, entered on a verdict.

The action was brought to recover rent alleged to be due the plaintiff from the defendants. The defendants set up in their answer an eviction from the premises, and damage to their goods by water and exposure, from acts of plaintiff in making certain changes in the premises. The court was of opinion, as it was expressly provided in the lease that such changes and alterations in the premises might be made, and there was no negligence shown in making the same, that the defense had failed, and that judgment was properly entered for the plaintiff.

Lewis Sanders, for the appellants.

E. Delafield Smith, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Judgment affirmed.

ELIJAH H. PURDY AND OTHERS, RESPONDENTS, v. LOUIS
SCHLESINGER AND OTHERS, APPELLANTS.

APPEAL from an order appointing a receiver of the proceeds of a sale, had under a chattel mortgage, of property fraudulently obtained from the plaintiffs in this action by the mortgagor, and alleged in this action to have been mortgaged for the purpose of cheating and defrauding these plaintiffs out of their claim for the purchase-price thereof. After a review of the facts in the case, the court was of the opinion that there was sufficient evidence of fraud in the giving

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of the mortgage to justify the appointment of the receiver, and affirmed the order.

T. M. Tyng, for the appellants.

Eugene F. Daly, for the respondents.

Opinion by DANIELS, J.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Order affirmed, with ten dollars costs besides disbursements.

STEPHEN KROM, RESPONDENT, v. JOHN J. LEVY,
APPELLANT.

MOTION for a reargument, and for leave to appeal to the Court of Appeals. The court was of opinion that the case was properly decided on the former argument,* and that no principle was involved which the public interests required should be examined by the Court of Appeals.

N. B. Hossie, for the appellant.

Coles Morris, for the respondent.

Opinion by DANIELS, J.

Present — DAVIS, P. J., BRADY and DANIELS, JJ.

Both applications denied, with ten dollars costs.

* See 1 Hun, 171.

Cases

DETERMINED IN THE

SECOND DEPARTMENT

AT

GENERAL TERM,

March, 1875.

CORNELIUS DU BOIS, JR., AS TRUSTEE, ETC., APPELLANT, v.
WILLIAM C. BARKER AND OTHERS, RESPONDENTS.

Trust estate—when vests in trustee—acts of trustee—when cestui que trust bound by.

In 1851, W. C. Barker and Beulah his wife conveyed certain real estate in Brooklyn to one Townsend, who, in 1859, reconveyed the same to the said Beulah. In 1861 Beulah died, leaving a will, by which she devised the property to the said W. C. Barker in trust for her two children, authorizing him to sell and dispose of the same. The deed from Townsend to her was not recorded, nor was the will proved. In 1867 Barker erased from the deed the name of his wife, inserted that of Schwerin, his brother-in-law, and then recorded the deed as thus altered. Portions of the property were subsequently sold and mortgaged to various persons, the conveyances being executed by Schwerin, although Barker received and used all the money received therefor.

In 1873 the will was proved, and the plaintiff appointed trustee thereunder. In this action brought by him against the various purchasers and mortgagees to recover the property, *held* (1), that the estate vested in the trustee by force of the will without probate thereof; (2), that the acts of Barker in taking possession of, renting and improving the estate, constituted an acceptance of the trust; (3), that though his acts were irregular or even criminal, yet they were an execution of the power of sale contained in the will, and by virtue of them a good title vested in the purchasers and mortgagees.

APPEAL from a judgment in favor of the respondents, entered upon the trial of this action at Special Term.

The defendant William C. Barker was appointed trustee under the provisions of a last will and testament left by his wife, which will contained among others the following provisions: "I give, devise and bequeath all my estate, both real and personal, whatsoever and wheresoever situate, of which I may be seized and possessed of at the time of my decease, unto my husband, the said William C. Barker, his heirs, executors, administrators and assigns forever; in trust, nevertheless, to hold, sell, or invest the same as he, my said husband, may think proper, and apply the income thereof, and as much of the principal as may be necessary for the maintenance and education of my two children, Rebecca and Myra, until they shall respectively arrive at the age of twenty-one years, and when they shall respectively arrive at the age of twenty-one years, then to divide the same equally between them share and share alike.

"I name and appoint my said husband executor of this my last will and testament, and guardian of the persons and estates of my two children aforesaid, as well as trustee to support all the trusts herein created.

"I also authorize and empower him to sell and dispose of my real estate, or any part of it, at such time as he may elect, by public or private sale, and by any deed or deeds of conveyance or assignment, to grant, convey and assign the same in fee simple, freed and discharged of and from all and every the trusts hereinbefore expressed, limited, and declared of and concerning the same, and without liability on the part of any purchaser or purchasers in respect to the application of the purchase-money and the proceeds of any such sale or sales, again to invest or apply the same in trust for the same uses and purposes, with the same powers, and subject to the same limitations as are hereinbefore expressed, limited, and set forth."

The other facts in the case are stated in the opinion of the court.

C. & N. D. Lawton, for the appellant. The title to said property being in Beulah T. Barker, at her death, she leaving minor children her heirs at law, such property could not be disposed of, incumbered, or in any wise or way affected; nor could any part thereof, except by an order of a court in a proceeding to which they

were parties. (3 R. S. [5th ed.], part 3, chap. 1, art. 7; Tyler on Infancy and Coverture, 296; *Rogers v. Dill*, 6 Hill, 415; *Onderdonk v. Mott*, 34 Barb., 106; *Baker v. Lorillard*, 4 N. Y., 266; Perry on Trusts, 610.) Or by the official acts of a duly qualified trustee under her will, acting as such trustee. (*Fisher v. Hubbell*, 65 Barb., 75, 90; *N. Y. Assn. v. Beekman*, 21 id., 565.) On the death of Beulah T. Barker, leaving a will of her real estate, appointing trusts in regard to the same, the equitable title thereto vested in the *cestui que trust*, while the limited legal title, restricted to an extent which only admitted of the carrying out the purposes of the trust under such will, vested in the trustee, dependent upon the proof of the will and the acceptance of the trusteeship under it, and until both of which took place such trustee took no estate in such lands which could be assigned, conveyed or mortgaged, so as to pass any interest therein under a power of sale in such will. (*De Peyster v. Glendinning*, 8 Paige, 310; *King v. Donnelly*, 5 id., 46; *Trask v. Donohue*, 1 Aiken [Vt.], 370; *Roseboom v. Mosher*, 2 Denio, 70, 69; Hill on Trustees [Am. ed., 1854], 239 [* paging]; *Sawyer's Appeal*, 16 N. H., 459; *Williams v. Cushing*, 34 Me., 372.) Upon the death of Beulah T. Barker, William C. Barker took possession of the estate as father and guardian in socage of the children, but this gave him no right or title to the property or power to deal with it by sale or incumbrance, but only to collect the rents and profits for the benefit of such children; and the fact of such possession could in no manner draw after it or clothe him with any right as trustee, or give him any power to deal with the property, except as above stated as guardian, and such possession gave no notice to the world of any further title or right to deal with such property. (*Sylvester v. Ralston*, 31 Barb., 286; *Jackson v. De Walts*, 7 Johns., 157; *Byrne v. Van Hoesen*, 5 id., 66; *Genet v. Talmadge*, 1 Johns. Ch., 561; *White v. Parker*, 8 Barb., 48; *Torrey v. Black*, 65 id., 414.) The non-production and the failure to apply for the probate of the will was a virtual refusal, on the part of William C. Barker, to act as trustee. (*In re Robinson*, 37 N. Y., 261; *Roseboom v. Mosher*, 2 Denio, 70; *Burritt v. Silliman*, 13 N. Y., 96.) The mere taking possession of the property in question cannot create or fix upon him the presumption that he accepted the trust, for even

if he had immediately on the death of his wife executed a written renunciation of his office as trustee, he would, nevertheless, have been entitled to the possession of the property as guardian in socage of his children, until the court, upon whom the trust devolved by his non-acceptance, could appoint another trustee of the estate. (*Sylvester v. Ralston*, 31 Barb., 286; *Jackson v. De Walts*, 7 Johns., 157; *Byrne v. Van Hoesen*, 5 id., 66.) Such acts in any event would be void as in contravention of the trust. (3 R. S. [5th ed.], chap. 1, part 2, title 2, § 84, p. 22; *Cruger v. Jones*, 18 Barb., 467; *Lahens v. Dupasseur*, 56 id., 266; *Powers v. Bergen*, 6 N. Y., 360; *Briggs v. Davis*, 20 id., 15; Perry on Trusts, 309.) The doctrine of estoppel cannot be invoked in this case against infants, the *cestuis que trust*, although there were acts done by William C. Barker which would estop him individually in regard to the property in question. (*Brown v. McCune*, 5 Sandf., 224; *Ackley v. Dygert*, 33 Barb., 177, 193.)

Sidney V. Lowell, for the respondent Ramsey. The will vested the legal title and estate in Barker, as trustee, he taking the same subject only to account for proceeds to the *cestuis que trust*. (1 R. S., 729, §§ 55, 60; *King v. Donnelly*, 5 Paige, 46; *Urch v. Walker*, 3 M. & C., 710.) The facts show an indisputable practical acceptance of the title or trust by Barker. (Hill on Trustees [Wharton's], vol. 1, p. 215, and cases cited; *Conyngham v. Con.*, 1 Ves., 522; *Montfort v. Cardagan*, 17 id., 487; *James v. Frearson*, 1 N. C. C., 375-377; *Re Uniatke*, 1 Jones & La., 1; *Re Needham*, id., 32; Lewin on Trusts, 230-232; *Chaplin v. Givens*, 1 Rice Eq., 132, 154; 2 Hill on Trustees, 214; *Thompson v. Leech*, 2 Ventr., 198; *Witt v. Franklin*, 1 Bin., 502; *Eyrick v. Hetrick*, 13 Penn., 494.) Barker's title as trustee would vest directly upon testator's death. (Williams on Executors, vol. 1, p. 255; Jarmin on Wills [Perkins], vol. 1, p. 219 and note.) He derived his estate through the will; the same was not deferred until probate or otherwise. (Williams on Executors, p. 256; Dayton on Surrogates, 258; Dwyer, p. 367 a; *Rex v. Stone*, 6 T. R., 298; *Fenton v. Clegg*, 9 Ex., 680.) Plaintiff is estopped by proceedings of his predecessor. (Coke Litt., 352 a; *Erroy v. Nicholas*, 2 Eq. Cases Abr., 488; *Zouch v. Abbot*, 3 Burr., 1802; 3 Sug. V. & P. [10th ed.], 428; *Watts v.*

Cresswell, 9 Vin. Abr., 415; 1 R. S., 730, § 66; *Heroy v. Kerr*, 2 Abb. Ct. Ap. Dec., 359.)

R. Ingraham, Geo. Ingraham and John H. Knaebel, for the respondents Morton, Whitson and Valentine.

Wm. S. Cogswell, for the respondent Merrill.

D. P. Barnard, for other respondents.

BARNARD, P. J. :

William C. Barker, prior to the 7th March, 1857, was the owner of certain lots of land situate in Brooklyn, particularly described in the pleadings. On that day he, by a full covenant warranty deed, transferred the same to Samuel Townsend, of the city of Philadelphia. This Mr. Townsend was the father of Barker's then wife. She joined in the deed. The premises were subject to two mortgages, one of \$1,200 and one of \$4,000. The payment of these mortgages was assumed by Townsend in the deed. On the 18th January, 1859, Samuel Townsend conveyed the same premises to Beulah T. Barker (Barker's wife), subject to a mortgage of \$1,200. Barker had, between the date of the Townsend deed and the date of the deed by Townsend to Mrs. Barker, paid the \$4,000 mortgage. The deed by Barker to Townsend was given immediately prior to the entry of a judgment of over \$3,000, against Barker, in favor of a Mr. Wolson. On the 11th March, 1861, Beulah T. Barker made her will, by which she devised the property to William C. Barker, in trust for her two children. The will gave full dominion over the property, including power of sale, and providing that the purchase should be "without liability with respect to the application of the purchase-money."

On the 28th of March, 1861, she died. The deed to her from her father, and the will by her, went upon her death into the possession of her husband, and both were kept a profound secret for many years—until the month of May, 1873. On the 9th January, 1867, William C. Barker put upon record the deed from Townsend to his (Barker's) wife, having erased, about that time, the name of Beulah T. Barker, the grantee, and in its place inserted

the name of Edward Schwerin, a person who had married his (Barker's) sister. Barker noted at the end of the deed, and before the witnesses' names, the fact that this erasure was made before the execution of the deed. Barker, a few days thereafter, agrees to sell two of the lots to Messrs. Harsey & Parkinson, and gives a deed therefor, executed by Schwerin on the 1st of April, 1867. On the 19th March, 1868, Schwerin conveys all the remaining property to Ellen Barker, the second wife of William C. Barker, and a sister of the plaintiff. William C. Barker and Ellen, his wife, subsequently executed various mortgages upon the property for the full face thereof, and conveyed two of the lots to Rachel W. Townsend, who was the wife of the Samuel Townsend who gave the deed to his daughter Beulah, and the mother of William C. Barker.

On the 12th of May, 1873, Beulah T. Barker's will was proven, and the plaintiff was appointed administrator with the will annexed by the surrogate of Kings county, and thereafter trustee, by this court, at Special Term.

The children of Beulah T. Barker are still minors. Schwerin received nothing for his conveyance. Barker received the consideration, as well from the direct sale by Schwerin as before the mortgages given by his wife upon the title she acquired from Schwerin. There is no evidence to warrant the finding that the deed given by Barker to Townsend was a mortgage. It was a plain case of a conveyance given to hinder, delay and defraud creditors. The title passed to Townsend as between the parties. By virtue of Townsend's deed to his daughter, she died having the fee of the property; and by her will it passed to William C. Barker in trust for her two children. Thus far the case seems plain.

If the trustee had received his wife's deed, and proven the will, and executed the trust openly under it, he would have done his duty; but this he failed to do. He suppressed the will and altered the deed, and recorded it as altered, so that the record was apparently right. He perfected titles in this way, and thus the question presented arises, where the loss is to fall — upon the children, the *cestuis que trust*, or upon the innocent purchaser and mortgagees who have acted upon the appearances of title which William C. Barker the trustee made. The trust created by the will was a

valid express trust under our statute.* The trustee took the whole estate subject only to the execution of the trust.† The estate devolved, by force of the will, without probate.

The evidence warrants the finding that Barker accepted the trust and executed it for many years. He took possession of the deed and will; took possession of, and rented and improved the property, and applied proceeds to the support and maintenance of the infants. Being the legal owner, and intending to make a good title, and for a good consideration, which he received, he may have proceeded irregularly, or even criminally. He executed the power of sale in the will. He made an apparently legal title, and received pay for it. I discover no evidence to warrant the finding that Edward Dubois was not a *bona fide* mortgagee, nor that Rachel W. Townsend was not a *bona fide* mortgagee and purchaser. They are proven to be related; Edward is a brother to Barker's wife, and Rachel W. Townsend is Barker's mother. This is not sufficient to destroy their claims without other proof. The judgment should be modified so that all transfers and mortgages given under Schwerin deed should be declared legal, the title to property untransferred by deed by Barker's first wife, be declared vested in plaintiff as trustee, subject to mortgages thereon; Barker to account as trustee before ————, referee, and be declared to pay any balance he may owe on such accounting.

Present — BARNARD, P. J., and TAPPEN, J.

Judgment modified in accordance with opinion, and as modified affirmed, with costs.

* Chap. 2, part 2, title 2, R. S., § 55, sub. 3.

† Sec. 60.

THE BOARD OF SUPERVISORS OF THE COUNTY OF
KINGS, RESPONDENT, v. ANTHONY WALTER, APPELLANT.

Sheriff — statute of limitations — section 2, chapter 733 of 1871.

The statute of limitations (one year) for acts done by a sheriff in his official capacity, and in virtue of his office, or by the omission of an official duty, is not applicable to a cause of action against the sheriff for procuring payment, by means of a sworn bill and false vouchers, for board of fictitious persons who were never confined in the county jail.

APPEAL from an order sustaining a demurrer to the defendant's answer, which alleged that the cause of action did not accrue within one year before the commencement of the action.

The action was brought to recover \$24,122.25, alleged to have been obtained from the county by the sheriff thereof, by means of fraudulent accounts and vouchers for the board and confinement of fictitious persons in the county jail.

N. H. Clement, for the appellant. Section 2, chapter 733, Laws of 1871, applies when recourse can be had to the official bond. (*Cumming v. Brown*, 43 N. Y., 514.) Its object was to relieve the sheriff's sureties. (*Morris v. Van Voast*, 19 Wend., 283; see particularly the revisers' notes referred to in the above case; *Dennison v. Plumb*, 18 Barb., 99.) The question then arises on this demurrer: In case the plaintiff recovers judgment against Walter, could recourse be had to the official bond? The form of the bond given by sheriffs is set forth in 2 Revised Statutes, 476, section 1. The bond is given against fraud, deceit or oppression, in those words. A sheriff's bond has been held liable for moneys collected for militia fines, and not paid over; for embezzlement of county moneys. (*People v. Brush*, 6 Wend., 454.) The moneys claimed are the excess of bills alleged to be fraudulent. The portion of bills paid which are admitted to be correct were paid to the sheriff *virtute officii*. They are paid to the sheriff as such by virtue of the statute, and not to him individually. "Acts done *virtute officii* are where they are within the authority of the officer, but in doing which he exercises that authority improperly or abuses the confi-

dence which the law reposes in him; while acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them." (*The People v. Schuyler*, 4 Comst., 187; *Seely v. Birdsall*, 15 Johns., 267.) The case of *Elliott v. Cronk's Administrators* (13 Wend., 35), has no application to this suit. That decision was on the express ground that the sheriff had done no affirmative act. Another test: Will the defendant, if successful in this case, be entitled to double costs? (2 R. S., 617, § 24.) If these acts charged are acts *virtute officii*, he would be. (*Burhans' Executors v. Blanchard*, 1 Denio, 626.) A justice, sued for malicious prosecution: held, that he was sued for an act done by virtue of his office. (*Row v. Sherwood*, 6 Johns., 107.) If a malicious act is committed *virtute officii*, is not a fraudulent one also committed by virtue of office?

Winchester Britton, for the respondent. This statute was passed with a view of fixing a limit of time to the liability of sheriffs' official bail, and has been construed to include acts of the sheriff for which such bail are liable, and such acts only. (*Dennison v. Plumb*, 18 Barb., 89-98; *Cumming v. Brown*, 43 N. Y., 514; *Parton v. Williams*, 3 B. & A., 330; *Morris v. Van Voast*, 19 Wend., 283.) The bail are liable for acts *virtute officii*, not *colore officii*. (18 Barb., 89, *ante*; *Alcock v. Andrews*, 2 Espinasse, 542, note; *Golden v. Elphinstock*, 4 Exch., 445; 3 Fisher's Digest, 5494.) Where levy is made without process, it is *colore officii*, not *virtute officii*, which former is defined to be when his office gives him no authority to do an act. (*People v. Schuyler*, 4 Comst., 180; *Seeley v. Birdsall*, 15 Johns., 267.) *Virtute officii* is defined to be when the officer is acting under color of his office, intending in good faith to perform a proper official act. (*Straight v. Gee*, 2 Starkie, 445.) The words of the bond cannot be extended beyond nonfeasance or misfeasance in respect to acts which by law he is required to perform as sheriff. (*Ex parte Reed*, 4 Hill, 573; approved, 4 Comst., 179.) Where the duty exists, and it is neglected or performed in an improper manner, the sureties are liable, otherwise not. (4 Comst., 180; 1 R. S., 876, § 162; 1 Crocker on Sheriffs, § 884; *Governor v. Hancock*, 2 Ala., 728, cited 4 Comst., 177.) In short, the statute under discussion applies to such acts of the sheriff as are

performed in the discharge of his duty as a public officer, or to the omission of some act required of him by his duty as such officer.

BARNARD, P. J. :

I do not think that the liability sought to be enforced in this action, is the result of an act done by the defendant as sheriff in his official capacity, and by virtue of his office. The defendant was sheriff, and, as such, had the official duty to board the prisoners in the jail; but the allegation is, that the defendant, by means of a sworn bill and false vouchers, procured payment for boarding fictitious prisoners, "persons who were never committed to, received, or confined in, boarded at, or discharged from said jail." It is a fraud of the gravest description, and one which procured a large sum of money, \$24,122.25, from the public treasury. The short statute of limitation (one year) for acts honestly done by sheriffs by virtue of their office, could not have been intended to cover up such a case. Order affirmed, with costs.

TAPPEN, J. (dissenting):

The defendant, while sheriff of Kings county, having the custody and being the keeper of the common jail, presented from time to time his accounts for the board of persons confined therein, including his fees for receiving and discharging such persons, to the supervisors, who audited such accounts; and the defendant was paid the amounts thereof. It is now claimed by the plaintiffs, that such accounts were fraudulently overstated by the defendant, and that a large sum was charged for persons who were never so committed, boarded or discharged, and this action is brought to recover back the amount of such overcharges, on the ground that the defendant's accounts were fraudulent.

The defendant's answer admits the auditing of his accounts, and that he was paid the amounts thereof, and denies the other allegations. He further alleged that the cause of action did not accrue within one year before the commencement of the action. To this latter defense the plaintiffs demurred and had judgment in their favor at the Special Term, and the defendant brings this appeal therefrom.

By chapter 733 of the Laws of 1871, section 2, it is provided that "no action shall be brought against any sheriff upon a lia-

bility incurred by the doing of an act in his official capacity and in virtue of his office * * * unless the same be commenced within one year from the time when the cause of action shall have accrued." It will be observed that this was an official account of the defendant, as sheriff, against the county. The duties of sheriff are largely performed by deputy, and by the assistance of others, and this is particularly the case in a large and populous county. His liability for any fraudulent charges against the county, would be good ground of action against him during any period of time not barred by statute. But the intent and purpose of the statute limiting the time for bringing suit for one year, were to enable both the sheriff and the sureties on his official bond to determine their liabilities within that time.*

This action was brought after the time so limited. It being the sheriff's duty to receive and discharge from, and to maintain at the jail all persons committed thereto, the accounts which are now questioned were for services arising out of his official duty.

I am of opinion that the defendant, in presenting his accounts and vouchers to the plaintiffs, and in having them audited, did so as sheriff, and not as a private individual or under color of office, and hence that the statutory limitation applies to this action. In *Row v. Sherwood*,† a justice of the peace being sued for malicious prosecution, it was held that he was sued for an act done by virtue of his office.

To prevent the statutory bar from being held applicable, it will be necessary also to hold that the defendant's accounts, so far as they are correct, were presented by virtue of his office, and so far as they were excessive, that they were not by virtue of his office, but under color of office. I do not think the distinction can be maintained. The statute of limitations is a statute of repose, and in the case of public officers, effect is to be given to it for such purpose.

The judgment of the Special Term sustaining plaintiff's demurrer, should be reversed.

Present — BARNARD, P. J., TAPPEN and GILBERT, JJ.

Order affirmed, with costs.

* *Cumming v. Brown*, 43 N. Y., 514; *Morris v. Van Voast*, 19 Wend., 288.

† 6 Johns., 109.

GEORGE C. GLACIUS AND ANOTHER, RESPONDENTS, v. BESSIE BLACK, APPELLANT.

Mechanics' lien law — personal judgment under.

When, during the pendency of an action, brought for the foreclosure of a mechanics' lien, the lien expires by lapse of time, a personal judgment may be recovered by the claimant.

APPEAL from a judgment in favor of the claimants (plaintiffs), and against the defendant (owner), and from an order denying a motion made on the judge's minutes for a new trial, and from an order denying a motion to set aside such judgment, in an action brought for the foreclosure of a mechanics' lien, under chapter 402, of the Laws of 1854. This cause has been once tried before a referee who reported in favor of the claimants. The judgment entered upon such report was affirmed by the General Term, and reversed in the Court of Appeals (50 N. Y., 145), and a new trial ordered. During the pendency of the suit, the lien expired, and a personal judgment was entered against the defendant on the last trial.

George A. Black, for the appellant.

Ernest Hall, for the respondents.

BARNARD, P. J. :

This action was originally brought to enforce a lien. It has been once tried before a referee, and the plaintiffs recovered a judgment. This judgment was reversed by the Court of Appeals. The second trial was before a jury. No lien is now demanded.

The jury rendered a verdict for the plaintiffs, on which a personal judgment has been entered against the defendant. The defendant appeals. If the validity of the lien law could be raised on this appeal, it would be useless to argue the question, in view of the many adjudications of the Court of Appeals, upholding and enforcing the provisions of that law.

The present judgment is personal ; and that such a judgment is permitted in this action, is decided in this case by the Court of

SECOND DEPARTMENT, MARCH TERM, 1875.

Appeals.* I discover no error committed on the trial. The question whether the contract had been substantially performed, was one of fact for the jury. The evidence was very conflicting. The judge could neither nonsuit nor direct a verdict. He instructed the jury according to the law of this case, as decided by the Court of Appeals.

The judgment should be affirmed, with costs.

Present — BARNARD, P. J., and GILBERT, J.

Judgment and order denying new trial affirmed, with costs.

IN THE MATTER OF THE REPORT OF THE COMMISSIONERS
OF ASSESSMENT FOR GRADING, PAVING, ETC., SACKETT
STREET, IN THE CITY OF BROOKLYN.

The power of the legislature to apportion the assessment of taxes, is as broad as the power of taxation itself.

APPEAL from an order confirming a report of commissioners appointed to make an assessment for certain local improvements. The improvement for which said assessment was laid, consisted of the grading and paving of Degraw and Douglass streets, from New York avenue easterly to the city line, a distance of about eight thousand feet; and of grading, paving, ornamenting, and otherwise improving Sackett street, from Washington avenue to the city line, a distance of about twelve thousand feet. The portion of the above mentioned streets improved as above stated, are situated in an unimproved portion of the city, which is unoccupied for the ordinary purposes of a city. On some lots included in the district of assessment fixed for said improvement, no assessment is laid, and the assessment laid on some of the lots of the appellants, situated in said district, is more than the sum at which said lots are valued or assessed for the purpose of annual taxation. The improvement referred to above was commenced under the authority of an act of the legislature, entitled "An act to widen portions of Sackett, Douglass and President streets, and otherwise to alter the commissioners' map of the city of Brooklyn"

* *Glacius v. Black*, 50 N. Y., 145.

(chapter 631 of the Laws of 1868), passed May 6, 1868, and continued under the acts amendatory thereof and supplementary thereto, to wit: chapter 710 of Laws of 1872, chapter 592 of Laws of 1873, and chapter 588 of Laws of 1874. And the said improvement was completed after the passage of the last above mentioned act.

Winchester Britton and *Benjamin F. Tracy*, for the appellants.

Wm. C. De Witt, for the respondent.

BARNARD, P. J.:

The objections taken, upon this appeal, to the title of the acts under which the improvements in question were made, have been passed upon by this court in *The People ex rel. McCann v. Schroeder*.

The power conferred by the act upon the park commissioners to make the district of assessment, is unobjectionable. "There being no constitutional prohibition, the legislature may create a district for that special purpose, or they may tax a class of lands or persons benefited, to be designated by the public agents appointed for that purpose, without reference to town, county or district lines." * It is no new exercise of the power. In some cases, the common council, by law, fix the district of assessment; in others, the assessors levy the assessment upon property they deem benefited. The power of apportionment of taxation is as unlimited as the power of taxation itself.

It appears by the papers that, in some instances, the benefit received by the lands assessed, by reason of the improvement, is greater than the assessed value for purposes of annual taxation. This is urged as an objection to the report. It may well happen that lands of small value may be much increased by an improvement as expensive and attractive as this appears to be. In the absence of evidence, we cannot intend fraud or partiality from the fact alone.

Order affirmed, with costs.

Present — BARNARD, P. J., and TAPPEN, J.

Order affirmed, with costs.

* *The People v. Mayor of Brooklyn*, 4 N. Y., 419.

4 94
71 564THE PEOPLE EX REL. OBADIAH WELLS, APPELLANT, v.
THE BOARD OF AUDIT OF THE TOWN OF HEMP-
STEAD, RESPONDENT.*Town auditors — mandamus to — when allowed.*

Where, after the adjournment of a board of town auditors, an order is granted requiring them to show cause why a mandamus should not be allowed to compel them to allow a claim of the relator, the adjournment will prevent the enforcement of the peremptory writ against the members thereof; but where such writ will lie, it may issue to be enforced at the next lawful meeting of the board.

APPEAL from an order made at the Special Term denying an application for a mandamus to compel the defendant to audit a bill of the relator for money paid out as counsel fees in an action brought for the benefit of the town of Hempstead.

A. N. Weller, for the appellant.

John J. Armstrong, for the respondent.

TAPPEN, J. :

A special town meeting was held in the town of Hempstead, on the 3d of July, 1874, after due notice, at which a resolution was adopted, by ballot, directing suits to be commenced against certain persons, to recover certain common lands of the town. The sum of \$400 was appropriated for the expense of the suits, and the relator, Obadiah Wells, was, by the same meeting, appointed attorney to institute the same. The suits were commenced, and a bill rendered by him against the town for \$255, for the money claimed to have been expended by the relator for counsel fees and other expenses in such suits. The board of town auditors, at a regular meeting, on the 28th November, 1874, had this bill before them, and passed a resolution rejecting it. The relator seeks, by mandamus, to compel the allowance of the claim. The Special Term denied his motion for the writ, and he now appeals to the General Term. The respondents say that the board of auditors had closed their hearings of accounts against the town, and had delivered their

certificate thereof to the supervisor, to be laid before the board of supervisors, and that this was done before the relator's claim was presented. Also, that the order of the Special Term requiring the respondents to show cause, was not granted until after the board of auditors had adjourned *sine die*.

We think the call for the town meeting sufficiently specific, and the proceedings at such meeting regular, and in accordance with the statute. Instead of intrusting the prosecution of the action to the supervisor, the town devolved that duty upon the relator. In making an appropriation it expressly agreed to pay to the relator his reasonable expenses in the performance of that duty. That a mandamus in cases of this kind is the appropriate remedy is held in *Bell v. Town of Esopus*, * and in *Brady v. Supervisors*. † The proceedings at the meeting were within the rule in *Cornell v. Town of Guilford*; ‡ and that the hours of meeting were not irregular, see 5 New York, page 22.

That the board of audit had adjourned formally and without naming a day for reassembling, is a reason why the peremptory writ cannot now be enforced against the members thereof; § but where the writ will lie it may issue, to be enforced at the next lawful meeting of the board.

The order of the Special Term should be reversed, with ten dollars costs, and the peremptory writ allowed, with ten dollars costs.

Present — BARNARD, P. J., TAPPEN and GILBERT, JJ.

Ordered accordingly.

* 49 Barb., 506.

† 2 Sandf.; affirmed 6 Seld., 260.

‡ 1 Denio, 510.

§ The People v. Board of Auditors of Town of Westford, 58 Barb., 555; affd. 36 How., 23.

THEODORE B. GATES, APPELLANT, v. AMOS F. ENO,
RESPONDENT.

Bill of exchange—refusal of drawee to pay in full or redeliver bill to payee—liability of drawee.

When the dealings between the holder and the person on whom a bill of exchange is drawn, show that the understanding between them is that the latter is to pay thereon the amount in which he is indebted to the drawer, and that the bill of exchange, with an indorsement thereon of the payment of such amount, is to be held by the drawee as a voucher for such payment: *held*, that by refusing to deliver the bill of exchange to the payee, the drawee does not make himself liable as an acceptor thereof under the provisions of 3 Revised Statutes (5th ed.), page 68.

Whether a builder's order be a bill of exchange or not, *quære*.

APPEAL from a judgment in favor of defendant, entered at the Kings county Circuit, on the dismissal of plaintiff's complaint.

Theodore B. Gates, appellant, in person.

George De Forest Lord, for the respondent.

TAPPEN, J.:

This is an appeal from a judgment entered in Kings county on the dismissal of the plaintiff's complaint at Circuit.

The plaintiff sought to charge the defendant with liability upon an instrument which the plaintiff claims to be a bill of exchange, and which reads as follows:

"Brooklyn, December 3, 1872. Amos F. Eno, 75 William street, New York.—Please pay T. B. Gates five hundred dollars, and deduct same from fourth payment on five houses on Ninth street, Brooklyn, between Third and Fourth avenue.

"Yours, etc., C. B. SKIFF."

The defendant did not accept the order by any indorsement in writing. He made a small payment to the plaintiff, who indorsed the following receipt on the back of the instrument:

"Received, December 19, 1872, on within order, ninety-five dollars and seventy-eight cents, same having been indorsed on note of C. B. Skiff, December 4, 1872.

"T. B. GATES."

The defendant retained this instrument, with this receipt indorsed on it, as a voucher against Skiff, who had contracted to build houses for the defendant; and plaintiff was furnishing Skiff certain building materials. There being no written acceptance by the defendant, he is sought to be charged with liability under the following provision of the statute: * "Every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, and who shall destroy such bill, or refuse, within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or non-accepted, to the holder, shall be deemed to have accepted the same."

At the time plaintiff obtained the instrument from Skiff, the latter was indebted to him on a promissory note for \$500; and the money which plaintiff might realize from Eno, was to be applied on this note, which the plaintiff retained and had in his possession at the time of the trial of this action. It therefore appears that he parted with no value for the instrument on which he seeks to charge the defendant.

It appears from the testimony of the plaintiff and his witness Mr. Haviland, that they called on the defendant with this order; the defendant said that parties had filed liens against the buildings for nearly the amount he owed Skiff, but that he would pay ninety-five dollars, being the difference between the liens and what he owed Skiff. "We talked it over and thought it was better to accept that, indorse it on the order, and have that money then; if there was anything left, Mr. Eno was to pay it on the order."

The defendant returned to Skiff this voucher, and Skiff afterward placed it in the defendant's possession; and it was produced by the defendant at the trial.

The plaintiff himself testifies that the understanding when he received the ninety-five dollars was, that when the liens were adjusted, whatever the balance was, the defendant would pay him

* 3 R. S. (5th ed.), p. 68.

on account of the draft. These dealings between the parties show that the payment of the order was dependent upon contingencies; that the plaintiff dealt with the order and with the defendant upon that basis and understanding, and that the instrument was in no sense, as between the parties, a bill of exchange. And, not being a bill of exchange, the statutory liability created by the non-acceptance or non-return of such an instrument, does not apply and does not reach the defendant.

The plaintiff did not leave this order with the defendant for acceptance; that was not his demand. He left it with the defendant as a voucher and authority to the latter against Skiff; and it was treated as in fact it was, a mere builder's order, whereby the owner might pay the person therein named any money accruing to his builder, to the extent named in such order. The plaintiff, having indorsed a payment of ninety-five dollars upon it, when he received that sum from the defendant, thereby authorized and justified the defendant's subsequent retention of the order so indorsed. And the plaintiff's subsequent demand for the order, so indorsed, does not, under the circumstances, bring the case within the statute above quoted, where a refusal to return the bill is to be deemed an acceptance.

It may be doubted whether the instrument, in all its features, constitutes a simple bill of exchange within the rules laid down and cases cited in *Edwards on Bills*, 139-141; but the construction given to it, and the dealings of the plaintiff and defendant in respect thereto, as disclosed by the testimony, clearly deprive it of the character which the plaintiff now seeks to ascribe to it.

The judgment should be affirmed, with costs.

Present — BARNARD, P. J., and TAPPEN, J.

Judgment for defendant upon the exceptions, with costs.

GEORGE LEARY, PLAINTIFF, v. ALBERT C. WOODRUFF,
DEFENDANT.4 99
132a 170*Lessee of warehouse and bulk-head—duty of, to persons unloading at.*

A lessee of a warehouse and the wharf in front thereof, who, for his own benefit, induces other persons to come there, is bound to keep his premises and the approaches thereto in suitable order for the business carried on there, and is liable to any person who is injured in consequence of any defect or obstacle, the existence of which could be discovered by a reasonable examination, commensurate with the use made of the premises.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term.

This action was brought by the plaintiff, as assignee of the owners and insurers of a barge, to recover the damages occasioned to her by being overturned in a slip at the foot of Harrison street, Brooklyn. The defendant, Woodruff, was the lessee of the warehouse, in which the cargo of the barge was to be stored, and of the bulk-head in front of it. By the terms of the lease the landlord was bound to repair and dredge the slip. As the tide went out, the barge settled upon a bar of sand, formed by the discharge from a sewer in Harrison street, and sunk. Neither the defendant nor the plaintiff knew of the existence of the bar.

E. D. McCarthy, for the plaintiff.

William W. Goodrich, for the defendant.

TAPPEN, J.:

The plaintiff on a trial at the Kings Circuit was nonsuited, and brings this appeal. The action was for negligence. The defendant occupied a wharf and warehouses at Brooklyn on the East river; the plaintiff had his vessel there unloading a cargo, and she careened and sunk. It seems that a bank or mound had accumulated under the water in front of and adjacent to defendant's premises, and, as the tide went out, the vessel met with the accident stated. The plaintiff says that, having been invited to the defend-

ant's premises for the business in question, a duty devolved on the defendant to keep his premises and the approaches thereto which were under his control in suitable order for such business. This proposition is supported directly by the case of *Carleton v. Franconia Iron and Steel Co.** In that case a vessel sustained injuries from a rock in the bed of the dock under water, and the defendants were held liable. And the court says, even if defendants had no title to the dock, yet, if they occupied it and the adjoining wharf, and for their own benefit induced vessels to come to the wharf, their liability is not diminished. The like principle is held in *Sweeny v. Old Colony R. R.*† A liability will not attach to the owner or occupant of the premises, if the defect or obstacle be so hidden that its existence could not be discovered by a reasonable examination commensurate with the use to be made of the premises.‡ The defendant, among other matters, claimed that the unskillful manner of unloading and discharging cargo by the plaintiff, was the cause of, or contributed to, the accident. After testimony had been put in on both sides, the court granted the defendant's motion to dismiss the complaint, directing the exceptions to be heard in the first instance at the General Term. We are of opinion that this was error, and that upon the facts proven the plaintiff was entitled to go to the jury.

A new trial is therefore ordered, costs to abide event.

Present — BARNARD, P. J., TAPPEN and GILBERT, JJ.

Exceptions allowed and new trial granted, costs to abide event.

M. J. TRUEDELL, ADMINISTRATRIX, ETC., PLAINTIFF, v.
HENRY BOOTH, DEFENDANT.

Tenant—surrender of premises by—chap. 345, Laws of 1860.

A tenant who, by his lease, agrees to make all necessary repairs, cannot surrender the possession of the premises and refuse to pay rent, on the ground that the walls of the house were unusually damp, and that in consequence thereof his family became and remained sick for some time.

* 99 Mass., 216. † 10 Allen (Mass.), 372. ‡ Shearman on Negligence, 658.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, a verdict having been directed for the plaintiff at the Circuit.

O. J. Wells, for the plaintiff.

Henry Brodhead and *D. G. Hurriman*, for the defendant.

TAPPEN, J.:

The defendant hired a dwelling-house from the plaintiff, and after entering into occupation, he paid rent up to a certain time, and gave notice to the plaintiff that he would not be bound, and would not remain for the remainder of the term; and he abandoned the premises. The reason given by the defendant is, that the premises were not tenantable. The house was a brick dwelling in Suffield street, Brooklyn. The defendant alleged the walls to be unusually damp, and that his family became and remained sick for some time by reason of such dampness. The plaintiff refused to receive the premises, and brought this action for rent. After testimony on both sides, the court ordered a verdict for the plaintiff for the sum claimed, and directed the defendant's exceptions to be heard at the General Term in the first instance. The defendant's request to go to the jury was refused.

The tenant, in addition to the yearly rent of \$800, also covenanted to make necessary repairs. The landlord's agent testified that this covenant had the effect of reducing the rent slightly, as compared with the rent paid by a prior tenant. There was no covenant to repair on the part of the landlord; no act amounting to an eviction on his part is shown; and wrongful acts of the landlord, which are mere negligence or trespass, do not bar the rent; * although the rule is otherwise where the landlord creates a nuisance near the premises, or is guilty of acts which preclude the tenant from the beneficial enjoyment thereof, provided, in such case, the tenant shall abandon the premises by reason thereof. † Vermin or noxious smells in and about the house, do not constitute eviction, so as to justify abandonment of the premises by the ten-

* *Edgerton v. Page*, 20 N. Y., 281; *Ogilvie v. Hull*, 5 Hill, 53.

† *Dyett v. Pendleton*, 8 Cow., 728; *Gilhooley v. Washington*, 4 N. Y., 217.

ant.* The case presents no fact whereby the right of abandonment can be held to have accrued to the tenant for any act or omission of the landlord. Reference is made by the tenant to chapter 345 of the Laws of 1860, which provides as follows: "The lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed, or be so injured by the elements, or any other cause, as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the land so leased or occupied." The construction given to this statute in *Suydam v. Jackson*,† does not make it available as a defense in this action.

We see nothing in the case which, by operation of law, exonerates the defendant from his liability to pay the rent; and the plaintiff should have judgment on the verdict, with costs.

Present — BARNARD, P. J., TAPPEN and GILBERT, JJ.

BARNARD, P. J., dissented.

Judgment for plaintiff on the verdict, with costs.

MICHAEL MURPHY, PLAINTIFF IN ERROR, v. THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

What evidence sufficient to authorize conviction in criminal cases — Parol evidence — when contents of written documents may be proved by.

To authorize a conviction in criminal cases, upon circumstantial evidence, it is not necessary for the prosecution to prove the case, to the exclusion of every possibility that the crime was committed by a person other than the prisoner; it is sufficient if the evidence satisfy the understanding and conscience of the jury, and exclude from their minds all reasonable doubt of the guilt of the accused.

* *Westlake v. De Graw*, 25 Wend., 669; *Vanderbilt v. Persse*, 3 E. D. Smith, 428.

† 54 N. Y., 453.

Upon the trial of the plaintiff in error for murder, a witness was allowed to testify that he was defendant in several suits in which the plaintiff in error and others were plaintiffs, and that he, together with the deceased, had been several times to attend the trial of them. He was then allowed to testify, against the objection of the plaintiff in error, as to what the suits were brought for. The prosecution offered the evidence to show that the motive of the prisoner in committing the murder was to prevent the deceased from testifying against him. *Held*, that as the objection was general it could not now be insisted that the contents of the pleadings in such suits could not be proved by parol.

Exceptions to the rule as to the admission of parol evidence of the contents of written instruments stated.

WRIT of error to the Court of Oyer and Terminer of Rockland county, to review the conviction of the plaintiff in error of murder.

On the evening of the 19th of April, 1874, while Mrs. Hujus, Robert J. Gamble and a servant girl, were sitting in a room in their house, at Nanuet, Rockland county, New York, some kind of fire-arm was discharged from the outside, through the window of the room, wounding Mrs. Hujus and Gamble, from the effects of which wounds Mrs. Hujus died shortly after. The plaintiff in error was tried and convicted of having murdered her.

Henry Daily, Jr., for the plaintiff in error.

Seth B. Cole, district attorney, for the defendants in error.

GILBERT, J.:

We are not called upon to examine the evidence to see whether it was sufficient to warrant the conviction of the prisoner. Upon that question the verdict of the jury is conclusive. Our duty is confined to the errors assigned in the bill of exceptions. Those relate exclusively to the admissibility of certain parts of the testimony. No exception was, or well could have been, taken to the charge of the judge. It is indeed said that it was his duty, without any request to do so, to instruct the jury that "one of the legal principles governing cases of this kind, where circumstantial evidence is relied on to convict, is, that the people must prove the case to the exclusion of every possibility that another person, and not the accused, may have committed the crime." No exception can be raised upon this point, for the attention of the judge was not in any way called to the rule contended for; it is wholly an after-

thought. Nor is there any such rule. On the contrary, the legal test of the sufficiency of every species of evidence to authorize a conviction, is its adequacy to satisfy the understanding and conscience of a jury, and to exclude from their minds all reasonable doubt of the guilt of the accused.* Such is the rule of the common law; and it has always prevailed in this State.

It is insisted that the court below erred in admitting parol evidence to prove what certain law suits of the prisoner and his brother, against one Gamble, were for. Gamble was called as a witness for the prosecution, and testified, without objection, that he was one of the defendants in those suits; that there were three suits; that they had been standing since 1868; that he had been several times to attend the trial of them; that he was accompanied by Mrs. Hujus (the deceased), he did not know how many times, but that she always went when the trial was coming off. The witness was then asked if he knew what the suits were for, and answered without objection that he did. He was then requested to tell the jury what they were for. To this the prisoner's counsel objected, but stated no ground of objection. The evidence was admitted, and an exception was taken to the ruling of the court by the prisoner's counsel. We think the exception is unavailing, because the objection was not put upon the ground that the fact could not be proved by parol. If it had been it might have been obviated, or the testimony withheld by counsel, or excluded by the court. For this reason it is an ancient and sound rule, that, when the objection is to the mode of proving a fact, and not to proof of the fact itself, it must be distinctly placed upon that ground. The rule is essential to insure fairness, and to prevent artifice and deception in the trial of causes. It governs trials in criminal as well as civil cases, and, in our opinion, ought to be steadily upheld whenever a case of either class is brought up for review. Especially should the rule be firmly adhered to in a case like this, where the objectionable evidence is not material to the issue, but is of a collateral fact of little importance. The only conceivable object of the testimony was to prove that the prisoner had a motive to kill the deceased, in order to prevent her from testifying against him. In that point of view, we are unable to perceive upon what princi-

*1 Stark. Ev., 577; 1 Greenl. Ev., 13.

ple the nature of the suits would affect that motive. Whether the object of the suits was to set aside deeds or to recover money, or for either of numberless other causes of action, was not material. The case, at all events, discloses nothing from which it can be inferred that the particular object of the suits strengthened the prosecution or weakened the defense. It does not even show that the deceased was possessed of any knowledge, which might render it necessary or expedient for Gamble to call her as a witness. The fact that she attended the court in his company, did not show that she was to be a witness on the trial. Having allowed the prosecution to prove without objection the pendency of the suits, the prisoner could not have been prejudiced by the evidence respecting the object of them. The error, therefore, if any was committed, affords no ground for reversing the conviction. *

These conclusions render it unnecessary to decide whether the object of the suits could be proved except by the production of the pleadings in them. Still, a brief discussion of the subject may be due to the occasion.

The general rule, undoubtedly, excludes all instruments which the law requires should be in writing, or which have been put in writing by the parties, and all other writings the existence of which is disputed, and which are material to the issue. † But the rule is not universal. For instance, births and marriages may be proved orally by those who witnessed them, notwithstanding the law requires a registry of them to be kept. And where the written communication or agreement is collateral to the issue it need not be produced. The fact of payment may be proved orally, though a receipt be taken; and the examination and confession of a prisoner, taken down in writing by the magistrate, but not signed and certified, are provable by oral testimony. Many other instances of a similar kind are given in the books. ‡ Mr. Best states the rule to be, that "when a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some *act*, independent proof *aliunde* is receivable." That rule does not, as it seems to us, conflict with the principle on which the exclusion of parol evidence of the contents

* *People v. Gonzalez*, 35 N. Y., 49-59. † *Greenl. Ev.*, § 85; *Best Ev.* (5th ed.), 310.

‡ *Greenl. Ev.*, §§ 86, 90; *Best Ev.*, *supra*.

of written instruments rests. If, however, we should be wrong in this, we think, for the reasons stated, that all objection to proving the fact orally was waived, and that it would be contrary to law to allow the exception.

We perceive no error in admitting evidence of the measurements made by the witness Pinkerton ; other witnesses had given the data on which they were made, and it was proper to put the result before the jury.

In whatever light the conduct of Pinkerton and Sharpe, in obtaining the confessions of the prisoner may be regarded, we have discovered nothing in the circumstances attending the giving of them, which tends to show that they were not voluntarily made, or which would have justified the exclusion of them. The jury had these circumstances before them, accompanied by the evidence of the prisoner respecting them, and it was their province, exclusively, to determine the weight to be given to confessions made under such circumstances.

We have now noticed all the exceptions worthy of remark. No error having been found, it is our plain and imperative duty to affirm the conviction. We have no dispensing power ; that has been deposited with the executive department of the government. From the courts the community has a right to demand a vigilant and firm execution of the law ; for their safety is in a great degree dependent upon it.

Conviction affirmed.

Present — GILBERT, TAPPEN and PRATT, JJ.

Conviction affirmed.

FRANCES H. McCOTTER, RESPONDENT, v. ANDREW LAWRENCE, EXECUTOR, ETC., OF ABRAHAM R. LAWRENCE, THE NEW YORK LIFE INSURANCE AND TRUST COMPANY AND ABRAHAM R. L. NORTON AND CECILIA A. NORTON, IMPEADED, ETC., APPELLANTS.

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Specific performance of contract to convey land— who are necessary parties to action for— Code, § 97— Statute of limitations.

All who are interested in a contract for the conveyance of land, must join with the plaintiff in an action brought for its enforcement, or a valid excuse for their not joining with the plaintiff must be shown.

Such defect is not remedied by a judgment directing a conveyance to be made to the plaintiff and her co-owners and their assigns, without naming them, as such co-owners have a right to elect to accept a specific performance, or to sue for damages for a breach of contract. Such an action is within section 97 of the Code.

In an action in equity by a vendee in an executory contract for the sale of lands, no proof of a demand or tender of performance, on his part, before instituting suit for a specific performance is necessary, but an offer to perform, made in the complaint, and ability to perform at the time of the decree, are sufficient; and the statute of limitations begins to run without any formal denial by the vendor of the right of the vendee.

Parol admissions and acts *in pais* are no longer sufficient to prevent the operation of the statute of limitations.

It is only when the vendee has become entitled to a specific performance of the contract by the vendor, by reason of a full performance thereof by the vendee, that the vendor will not be allowed to disturb his possession, or to interpose the statute of limitations as an obstacle to his right to have his equitable title perfected by a conveyance of the legal estate.

A court of equity has no more power to disregard the statute of limitations than a court of law.

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was brought by the plaintiff, as assignee through various mesne assignments of Alexander McCotter, to compel performance of a contract between him and Abraham R. Lawrence, deceased, dated January 22, 1853, for the sale to McCotter of forty-five acres of land, situated at Newtown, Long Island, for the price of \$20,250, payable, \$5,000 on June 1, 1853, \$5,000 on September 1, 1853, and \$10,250 in a bond and mortgage of three years.

The contract recited the intention of McCotter to divide the forty-five acres into small lots, and Lawrence agreed, at the expense of McCotter, to give separate deeds for the particular lots. Abraham R. Lawrence died on August 3, 1863. The defendants were his executor, heirs at law, legatees and devisees. By the arrangements for the settlement of his estate, all the interest of Lawrence vested in the defendants Abraham R. L. Norton and Cecilia A. Norton, and in the New York Life Insurance and Trust Company, as trustee for them; and they, with the executor, alone appeal.

The complaint alleged the contract; the assignment of a half interest from McCotter to John H. Cornell and Frederick Pentz; the conveyance by Lawrence of 103 of the lots; the payment, prior to the times fixed in the contract, of \$17,000 (on the trial this allegation was amended so as to state the true amount paid, \$19,000, leaving only \$1,250 of the price due); that McCotter had entered into and retained possession; that Lawrence, from time to time, down to 1861, had executed conveyances, acquiescing in the postponement of the balance due, and that, after his death, McCotter had applied to the defendant Andrew Lawrence, as executor, for a deed, offering to pay the balance due, with interest; that the executor had put him off on various pretexts, and that, in the end, it had been necessary to sue.

Abraham R. L. Norton and Cecilia A. Norton were infants at the commencement of the action, and they interposed answers; the defendants Andrew Lawrence, as executor, and the Trust Company, also answered, and the several answers substantially put the plaintiff to proof of all allegations of her complaint.

J. S. Lawrence, B. J. Blankman and B. Robinson, for the appellants.

John E. Parsons, for the respondent.

GILBERT, J.:

Setting aside many considerations which might influence our discretion in granting or refusing a decree in this case, if the plaintiff were otherwise entitled to a specific performance of the

contract, we are of opinion that the judgment appealed from cannot be sustained upon any ground, legal or equitable.

The legal title to the lands in controversy is unquestionably vested in the New York Life Insurance and Trust Company. The plaintiff proved nothing more at the utmost, than an equitable title to an undivided moiety thereof; and yet, on that proof alone, she has obtained a judgment, which, if affirmed and executed, would divest the Trust Company of its whole estate in the lands. This bare statement of the result of the trial, I am sure, is sufficient to demonstrate that the judgment is erroneous.

Those in whom the equitable title to the other moiety is vested, were necessary parties plaintiff. A decree cannot, with any show of justice to the defendants, be made without their presence. The law will not tolerate a suit to enforce a contract by piece-meal. All who are interested in having a contract performed must join in a suit therefor, or a valid excuse for their not joining with the plaintiff must be shown. The statute on this subject is imperative, and is merely declaratory of a very ancient rule.* This proposition seems to be incontestable, and, in a case like this, ought to be rigorously enforced, because it is manifest that the court cannot determine the controversy before it, without prejudice to the rights of the defendants, as well as those of the absent plaintiffs, if, indeed, any of the parties have any rights under the contract. The attempt made by the referee to obviate the objection arising from the defect of parties, by directing a conveyance to be made to the plaintiff and her co-owners, and their assigns, without naming them, cannot be sanctioned. If such co-owners retain their interest under the contract, they have a right to elect whether they will accept a specific performance, or sue for damages for a breach of the contract. The plaintiff cannot make that election for them. They could not, it is true, sue alone; yet, if an action at law for such damages should be brought by all the parties interested in the contract, the judgment in this suit would not be a bar thereto. That judgment, therefore, affords no protection to the representatives of the vendor against the exercise of that right. Nor would the conveyance ordered be equivalent to a performance of the contract as to such co-owners, even if we might assume that they preferred

* Code, § 119.

land to money; for the reason that the judgment does not establish their rights. Another adjudication would be necessary to ascertain who were intended as grantees, or the persons answering to the description of them contained in the conveyance, and to determine their respective interests. Furthermore, the Trust Company has a clear right to remain vested with its legal title, until a paramount claim on the part of such co-owners shall have been successfully asserted by them.

We think, moreover that the right of action upon the contract has been barred by the statute of limitations. The case is within section 97 of the Code, which provides that the suit must be commenced within ten years after the cause of action accrued. It has been settled by a series of decisions, that the cause of action in equity of a vendee in an executory contract for the sale of lands, accrues whenever he becomes entitled to sue for a specific performance of the contract. No demand, or tender of performance on his part, is necessary before instituting such a suit, but an offer to perform, made in the complaint, and ability to perform at the time of the decree, are all that are requisite.* And the statute begins to run without any formal denial on the part of the vendor of the right of the vendee. In *Peters v. Delaplaine*,† there was no denial of the vendee's right, but there was only a failure to perform by the vendor, because his wife refused to sign the deed to be given by him. Upon the principle stated, the cause of action upon this contract accrued in January, 1856; and the suit was not commenced until October, 1870. We are unable to perceive why, if the plaintiff has any cause of action now, she, or those under whom she claims, had not the same cause of action, at any and all times between January, 1856, and January, 1866. Although neither of the parties to the contract chose to exercise the rights given by it, that fact did not postpone the accruing of the cause of action.‡ Nor did the demand for a conveyance, made after the death of the vendor, avoid the bar of the statute, or create a new cause of action.§

The referee has not found that the time for the performance of the contract by the vendor was extended, nor is there any evidence that it was extended. The declaration made to Mr. McMahon by

* *Bruce v. Tilson*, 25 N. Y., 194; *Peters v. Delaplaine*, 49 id., 362.

† *Supra*.

‡ *Roberts v. Sykes*, 30 Barb., 177.

§ 25 N. Y., 196.

the vendor, that the vendee "need not trouble himself about anything he owes me," etc., did not have that effect, independently of the objection that it was not in writing, which will be noticed hereafter. At the utmost, it was a mere postponement of the exercise of the vendor's present right to enforce the contract against the vendee, but it did not take away or affect any right which the vendee had against the vendor. The referee strained the evidence, when he called it an agreement that the balance due on the contract might remain pending the appeal. But if it was an agreement, it was *nudum pactum*.

The referee denied the appellants' motion to dismiss the complaint, made upon the ground that the suit was barred by the statute of limitations, but did not state any reason therefor; nor did he find any of the facts upon that subject. He evidently placed his decision, that the suit had not been barred, upon the supposed agreement made through McMahon, before mentioned, and upon the following facts reported in the findings, namely: That shortly after the contract, the vendee entered into possession of the premises in controversy, and continued to be in possession thereof, and to exercise ownership over the same, down to the commencement of this suit; and that he paid taxes thereon, and expended considerable sums of money in opening and grading streets, and other improvements; that the vendor died August 3, 1863, and down to his death no proceedings were taken by him, so far as appeared, either to require payment of the balance due upon the contract, or to divest any rights under it; and that he had, as late as on or about April 16, 1861, and from time to time down to that date, continued to execute conveyances of parts of said premises, at the instance of the vendee.

Parol admissions and acts *in pais* are no longer sufficient to prevent the operation of the statute of limitations. For, by section 110 of the Code it is provided, that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of its operation, unless the same be contained in some writing signed by the party to be charged thereby. The only writing signed by the vendor within ten years before the commencement of this action, is a deed, dated April 16, 1861, to one Herring. But that has no legal significance here as a

written acknowledgment, because it was made merely to effect an exchange of lots, which the vendor had conveyed in 1853, for the lots described in the deed. It was not, in any sense, a transaction based on the continued obligation of the contract, but a substitute for an old one, done while the contract by its terms was in force. Nor is the case materially affected by the question of the possession of the lots which have not been conveyed. It is only where the vendee has become entitled to a specific performance of the contract by the vendor, by reason of a full performance thereof by the vendee, that the vendor will not be allowed to disturb his possession, or to interpose the statute of limitations as an obstacle to his right to have his equitable title perfected by a conveyance of the legal estate.* In such a case the decree enforces a trust rather than a contract. The court would afford the same relief if there were no formal contract. It may not be amiss to remark, however, that, in our opinion, the fact that possession was taken by the vendee under the contract, was not sufficiently proved. Possession was not provided for in the contract. The consent of the vendor, therefore, was necessary to effect any valid change of possession. The only witness on the subject was the vendee, and he was not a competent witness to prove such consent.†

The provision of the Code, requiring a written acknowledgment to take a case out of the statute of limitations, has effectually destroyed the old doctrine on which courts of equity relieved vendees from forfeitures incurred in consequence of their failure to perform executory contracts for the sale of lands. That doctrine rested on the principle, that time was not of the essence of the contract. But now the statute has interposed an absolute bar after the lapse of ten years. It would be a violation of this statute, to give to the acts of the vendor referred to, such an effect as would suspend its operation. The statute itself provides, that the time during which certain specified disabilities may continue shall not be computed; but none of those acts are included among them. Courts of equity have no more power to dispense with a statute than courts of law.‡ When they have apparently done so, it has been upon the idea that the facts of the particular case took it out of

* *Miller v Bear*, 3 Paige, 466; *Bruce v. Tilson*, *supra*.

† Code, § 899.

‡ Story Eq. Pl., §§ 75, 831.

the statute.* Contracts which could not be enforced at law, because they were not made conformably to the statute of frauds, have been rendered effective by courts of equity on that ground, and, by our statute of frauds, the right to do this is expressly reserved to those courts by the proviso, that nothing therein contained shall be construed to abridge their powers to compel the specific performance of agreements in cases of part performance thereof.† It must be presumed, that if the legislature had intended to authorize a like exception in the statute of limitations, they would have inserted in it a similar proviso. However that may be, I know of no principle that would justify the court in refusing to execute a statute in a case clearly within its provisions. We must, therefore, hold the law to be, that with the exception of cases where the contract has been fully performed on the part of the vendee, or there has been a waiver by the vendor of the benefit conferred by the statute of limitations, neither part performance, nor any other considerations which have heretofore actuated courts of equity in decreeing the specific performance of contracts, notwithstanding the lapse of time, can be allowed as an answer to the peremptory bar created by section 97 of the Code, without the written evidence required by section 110 of the Code. For the part performance in this case, the vendee received an equivalent in the lifetime of the vendor, by a conveyance of nearly two-thirds of the property agreed to be conveyed, upon making payments amounting in the aggregate to no more than a proportionate part of the price. The referee, we think, erred in respect to the payments, by giving the vendee credit for property which, although originally taken by the vendor in payment, was returned to the vendee and retained by him. Making allowance for this and for interest, the price of the land conveyed and the amount of the payments would be very nearly equal. The last payment on the contract appears to have been made in 1853, ten years before the death of the vendor. No suit having been instituted to obtain a conveyance of the remainder of the lots during a period of nearly fifteen years after the cause of action accrued, and of seven years after the death of the vendor, we think it would be inequitable to undo the bar of the

* Wetmore v. White, 2 Cal. Ca., 109; Rhodes v. Rhodes, 3 Sandf. Ch., 279.

† 2 R. S., 185, § 10.

statute, even if we had the power to do so, especially as rights of devisees and of strangers have intervened.

We have considered several minor questions presented on the argument, but enough has been said to dispose of the case without discussing them.

The judgment must be reversed and the complaint dismissed, with costs.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment reversed and complaint dismissed, with costs.

GEORGE W. BARNETT, RESPONDENT, v. THE CHICAGO AND
LAKE HURON RAILROAD COMPANY, APPELLANT.

Non-resident corporation — process, how served upon — effect of judgment against —
2 R. S., 458, 459.

At common law, process against a corporation must be served on its head or principal officer, within the jurisdiction of the sovereignty where the artificial body exists.

A judgment recovered in an action commenced against a foreign corporation under the provisions of the Revised Statutes (2 R. S., 458, 459; Laws 1842, chap. 197) binds only the property of the corporation within this State, and has no extra-territorial force.

Under the statutes of this State, service within this State on the proper officer of a foreign corporation, is equivalent to personal service on a non-resident natural person. If such personal service cannot be made, service may be made by publication against corporations in the same cases in which it can be made against non-resident individuals.

The provisions of the Code in respect to the "provisional remedy" of attachment, and to the entering of judgment, apply alike to non-resident individuals and to foreign corporations.

Effect of judgment against a non-resident corporation which has no property within this State discussed.

APPEAL from an order denying a motion made on behalf of the defendant (counsel appearing for that purpose only) to set aside the service of a summons in this action, which was served in the city of New York on the president of defendant. The cause of action was alleged to have arisen in this State. The motion was

made on affidavits showing that the defendant was a foreign corporation, and had no property and no officers or agencies in this State. The motion was denied.

. *Sinnott & Meyer*, for the appellant. A corporation has no legal existence out of the boundaries of the sovereignty by which it was created. (Angell and Ames on Corp., § 104, p. 79, and cases there cited; 1 Black, 286.) It follows inevitably that a corporation cannot be served personally outside of the State giving it its existence; hence that the courts of this State cannot acquire jurisdiction of the person of a foreign corporation, unless by voluntary appearance. (18 How. Pr., 218; *Brewster v. Michigan Central R. R. Co.*, 5 id., 183; *Howell v. Chic. and No. West. Railway Co.*, 51 Barb., 378; *Bates v. N. O., J. and Grt. Nor. R. R. Co.*, 4 Abb. Pr. [N. S.], 72; 30 Barb., 164.) To make a judgment valid, it is necessary that the court rendering it should have jurisdiction of the subject-matter, and, in addition thereto, either of the person or of the property of the defendant. (*Thompson v. Whitman*, 18 Wall., 157, and the cases there cited; *D'Arcy v. Ketchum*, 11 How., 165; *Knowles v. Gas-light and Coke Co.*, 19 Wall., 58.)

Robert Sewell, for the respondent.

GILBERT, J. :

At common law, jurisdiction over a foreign corporation could not be acquired by the service of process upon an officer thereof, outside of the State which gave it existence. In *M'Queen v. Middletown Manufacturing Company*,* the rule of the common law is thus stated by SPENCER, J. : "The process against a corporation must be served on its head or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another State were to come within this State, he would not represent the corporation here; his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." Consequently, the court in that case set aside an attachment on the ground that a statute which authorized

* 16 Johns., 5.

attachments against the estates of non-resident debtors, generally, did not apply to foreign corporations. The same principle has been decided in numerous cases. * It is, however, within the competency of the legislature to authorize suits against foreign corporations. The Revised Statutes gave such authority and prescribed the manner in which it should be exercised. † This proceeding it is true was substantially *in rem*. The judgment in it bound only the property of the corporation within this State, and it had no *extra-territorial* force. I never heard the validity of this legislation called in question, and it was not disputed on the argument of this case. An attempt was made to show that, while the legislature had power to authorize a suit against a foreign corporation *in rem*, it had none to authorize one *in personam*. But no good reason for such a distinction was stated, or has ever been brought to my knowledge. If the legislature has power to authorize any suit, they may prescribe what kind and the mode of procedure in it. There is nothing constitutional or fundamental in the method of procedure in an action. The legislature might have provided that the suit under the Revised Statutes might be commenced by summons, with publication of notice, and have directed that the property might be seized only after a judgment had been entered, and then by execution thereof. Or the attachment might have been made a mere incidental remedy in the suit. In short, the mode and order of procedure might have been changed without changing the nature and effect of the judgment. The presence of property in the State was necessary to uphold the validity of the proceeding, only because the legislature had made it so. The only question, therefore, is whether the proceeding in this case is authorized by the Code. This court has held, on two occasions at least, that it is; ‡ and we think these decisions are correct. The successive amendments to the Code demonstrate the intention of the legislature on this subject very clearly. That statute, in 1849, authorized a suit against a foreign corporation, by a resident of the State, for

* Nash v. The Rector, etc., 1 Miles, 78; Dawson v. Campbell, 2 id., 171; Clark v. N. J. S. Nav. Co., 1 Story, 531; Lafayette Ins. Co. v. French, 18 How. (U. S.), 404; Peckham v. North Parish, etc., 16 Pick., 286.

† 2 R. S., 458, 459; Laws 1842, chap. 197.

‡ Prouty v. Mich. S., etc., R. R., Co., 4 N. Y. S. C., 230, and Ives v. The Memphis, El Paso and Pacific R. R. Co., Fourth Dep., April, 1874, not reported.

*any cause of action.** Section 427 has never been changed. The Code of 1848 also enacted that all actions should be commenced by summons,† and prescribed the mode of service on individuals and on corporations;‡ on the latter by delivering a copy to the president or secretary, etc.; but, by section 135 it was enacted, that if *the person* on whom service is to be made cannot be found within the State, publication should be made, in cases against foreign corporations as well as non-resident individuals. The condition on which publication is required is in each case the same, namely, that *the person* to be served cannot be found within the State. The same statute authorizes attachments to be issued against foreign corporations as well as individuals, but does not require an attachment to be issued as an element of jurisdiction. The attachment, however, can be issued only in an action.§ In 1851, section 134 of the Code was amended by the provision that service should not be made on a foreign corporation unless it had property within the State, or the cause of action arose therein; and although section 135 was also amended at the same time, yet, when these facts existed, the mode of service of a foreign corporation was left the same as before. By the act of April 10th, 1855,| the legislature took another step in advance, and authorized service to be made on agents of foreign corporations, or persons who acted as such, when such corporations were doing business in this State. In 1859, a decisive amendment was made to section 134 of the Code, by enacting that service may be made upon a foreign corporation, not only when it has property within this State, or the cause of action arose therein, but when such service shall be made within this State personally, upon the president, secretary, or treasurer thereof. There has been no change in the law, in respect to publication, since the amendment of 1859. The history of the legislation on this subject, therefore, demonstrates the intention of the law makers to have been, to make service within the State on the proper officer of a foreign corporation, equivalent to personal service on a non-resident natural person. If the non-resident individual, or the proper officer of the foreign corporation is within the State, the mode of service is the same; and publication is not required in either case.

* Sec. 427; see, also, Laws 1849, chap. 107.

† Sec. 134.

§ Sec. 237.

† Sec. 127.

| Page 470.

If not in the State, and such service cannot be made, there must be publication in both cases; and jurisdiction is thereby acquired, if either the individual or the corporation has property in the State, or the cause of action arose therein. So, too, the provisions of the Code, in respect to the "provisional remedy" of attachment, and to the entering of judgment, apply alike to non-resident individuals, and to foreign corporations; not the slightest distinction is made between them.

What the effect of a judgment, recovered according to law, against a foreign corporation which has no property in this State, may be, it seems to me, is an inquiry which has no bearing on the case. "It would operate on nothing in the State," as was said by Judge ROOSEVELT;* but I am not certain that "it would be regarded by nobody out of it." It is not necessary that a judgment should be universally binding to give it validity in the State where it was recovered. There is some reason for saying that such judgment ought to be universally binding.† A large number of foreign corporations have, in fact, migrated into this State, and established offices here. They make contracts here. Why should not those contracts be enforced here? If the corporation makes the contract by its officers, it ought to be amenable to the jurisdiction of the courts of the place where the contracts are made; and that can be accomplished only by allowing a service thereof on its officers. It is only by such a service that jurisdiction of a corporation can be acquired anywhere; and if it can thus be acquired in one place, I am at a loss to perceive why it may not in any other.

Without adverting to the decisions on this subject, cited on behalf of the defendant, I will only repeat that I think the cases decided in the first and fourth departments, before cited, are sufficient authority for the conclusion that the order appealed from should be affirmed.

Present — GILBERT and TAPPEN, JJ.

Order affirmed, with ten dollars costs.

* 80 Barb., 171.

† See 41 Geo., 661-670; Const. U. S., art. 4, § 1.

HENRY S. BALDWIN, APPELLANT, v. LAWRENCE
BARRETT, RESPONDENT.

Arbitration after judgment and pending appeal, of matters determined by the judgment — effect of.

When parties, pending an appeal from a judgment in an action in which they are the parties, enter into an agreement to arbitrate the matter in dispute in the action in which judgment has been recovered, such action implies a mutual abandonment of the judgment. The fact that the submission to arbitration is not acted upon within the time therein designated, does not revive the judgment thus abandoned by its being entered into. (BARNARD, P. J., dissenting.)

APPEAL from an order made at the County Court of Putnam county, staying the proceedings in this action, and directing the return by the sheriff of an execution issued herein.

This action was brought in a Justice's Court by Baldwin against Barrett, and judgment rendered in favor of Baldwin for \$135 and costs, April, 1866. Appeal was taken by Barrett to County Court of Putnam county, May 26, 1866, but no bond on such appeal was given.

On July 7, 1866, while such appeal was pending, the parties entered into an agreement under their hands and seals, reciting that disputes and litigation had arisen between them in relation to divers matters growing out of certain horse trades and the purchase of a cow, submitting all matters in dispute between the parties to arbitration, and agreed to abide by and perform the award, "provided the said award be made in writing and ready to submit and deliver to said parties, or such of them as may desire the same, on or before the 1st day of December, 1866." It was further agreed that judgment might be entered in the Supreme Court on the award. Nothing was done under the submission.

On February 18, 1867, the appeal was dismissed on Baldwin's motion, and subsequently an execution was issued on the judgment of the justice, a transcript of which was filed in the county clerk's office, and Barrett's property advertised for sale. On January 7, 1868, the County Court of Putnam county made an order staying proceedings on the execution, and directed its return to the office

of the clerk of said county. Baldwin thereupon appealed to this court.

Wm. R. Baldwin, for the appellant.

C. Frost, for the respondent.

GILBERT, J. :

The necessary effect of the submission was to extinguish the judgment and to waive the appeal. It related to the same subject-matter, and provided for the entry of a judgment in the Supreme Court upon the award. The parties to it had, by it, secured a retrial of the controversy between them. If it had been made pending the suit in which the judgment was recovered, it is conceded that its effect would have been to discontinue the suit, and such, no doubt, is the rule of law. The reason is, that the parties have selected another tribunal for the trial of the case.* The same reason applies after judgment as well as before, unless it be agreed that the judgment shall remain as security, or for some other collateral purpose. The submission shows the intention of the parties to abandon the litigation in court, and to resort to another method of determining the controversy between them. This necessarily implies a mutual abandonment of all previous proceedings. To use the language of BEARDSLEY, J., in *Van Slyke v. Lettice*,† the parties intended to blot out the suit from its commencement before the justice to the appeal to the County Court.‡ The fact that the submission has not been acted on, does not alter its legal effect upon the judgment and the appeal. §

The order of the County Court is right, and should be affirmed.

BARNARD, P. J. (dissenting) :

This case does not come under any case cited by respondent.

The plaintiff obtained a judgment for over \$100 before a justice. The defendant appealed and gave no undertaking. This appeal

* *Larkin v. Robbins*, 2 Wend., 505.

† 6 Hill, 610.

‡ See, also, *Grosvenor v. Hunt*, 11 How. Pr., 855; *Miller v. Van Anken*, 1 Wend., 516.

§ 2 Wend., *supra*.

was not regular, and was dismissed for that reason. The judgment before the justice remained in full force. The agreement to arbitrate was conditional upon its execution by the 1st of December, 1866. The arbitrators never met. No reference is made in the agreement to arbitrate to the judgment. I do not think it is paid. The plaintiff ought to have the right to enforce it.

The order should be reversed.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Order affirmed, with costs.

JOSHUA HARRISON AND ANOTHER, RESPONDENTS, v. HENRY
R. GLOVER AND OTHERS, APPELLANTS.

Market-price — how determined.

The market-price of goods is proved as well by evidence of what they could be bought for, as by actual sales.

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

The parties made an agreement in writing, in which it was specified that the plaintiffs should supply the defendants with certain woolen blankets, and that the defendants should sell them on commission. The action grew out of this clause of the agreement, viz.: "It is hereby agreed that the blankets shall not be sold for less than those made by Dobson & Schofield, of Philadelphia, at the proper time for selling them." The defendants sold a large quantity of plaintiffs' goods for a less price, as plaintiffs claimed, than Dobson & Schofield's blankets were sold for. The referee gave the plaintiffs judgment for the difference between the price at which the goods were sold and the price they would have brought at the rates at which Dobson & Schofield's goods sold. From that judgment the defendants appeal.

The defendants claimed that, prior to making the sale in dispute, they called on Dobson's agent in New York, and that he offered to

sell Dobson's blankets at the price they obtained on the sale in question.

Daniel T. Walden, for the appellants.

Walter C. Anthony, for the respondents.

GILBERT, J.:

We think the referee erred in his interpretation of the contract in this case.

The fair meaning of the language employed, is, that the market-price of Dobson's & Schofield's goods was to be the minimum price of the plaintiffs'. The market-price of goods is proved as well by evidence of what they could be bought for, as by actual sales. Market-prices are fixed every day in that way on all our exchanges. It would frustrate the chief object of the contract on both sides, to give it the construction put on it by the referee. That object was to sell the goods, but if the defendants were not permitted to compete with Dobson & Schofield, by offering the plaintiffs' goods at as low a price as Dobson & Schofield were willing to sell their own, it is manifest that the latter would monopolize the trade. Suppose Dobson & Schofield offered to sell to a customer of the defendants goods at a price less than that at which previous sales had been made by the former, and the defendants were not at liberty to regard that as the price intended by the contract, it is manifest that they would lose the customer.

That certainly was not the intention of the parties. It is true the construction we have put upon the contract would authorize a competition, which, if continued for a sufficient length of time, might ruin both Dobson & Schofield and the plaintiffs. But this could not happen to the plaintiffs, unless the defendants were grossly derelict in their duty as factors. If they duly performed their duty to the plaintiffs, as we must presume, they would stop making sales which would subject the plaintiffs to loss, until they had received instructions to make them, or how else to act. The relation of principal and factor is one of mutual confidence, and much must necessarily be left by each to the judgment and good faith of the other.

The interpretation of contracts ought not to be affected by a desire to shield either party absolutely against possible consequences of fraud or any other wrong. On the contrary, the presumption ought to be that the parties contracted on the basis that each would act honestly toward the other, and, if they wish to do away with this presumption, they must make their stipulations express, and in unambiguous language to that effect.

This error of the referee would not have been sufficient to warrant a reversal of the judgment, if he had found the fact that the sales, of which the plaintiffs complain, were not made in good faith, at a price at which the goods of Dobson & Schofield had actually been offered. But he did not so find. On the contrary, he rests his decision solely upon the fact that such sales by the defendants were made at a price less than Dobson & Schofield had actually sold their goods.

We are of opinion, therefore, that the fact found does not justify the conclusion of law on this point.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment reversed and new trial granted, costs to abide event.

4 128
130a 270

ISAAC S. SMITH, EXECUTOR, ETC., APPELLANT, v. FREDERICK W. STARR, RESPONDENT.

Guarantee — when personal.

The defendant guaranteed the payment of a certain bond and mortgage "to Arthur Childs, the present owner and holder of said bond and mortgage, his executors and administrators;" *held*, that the guarantee was a personal one confined to Childs, his executors and administrators, and that the assignee of the bond and mortgage could not maintain an action thereon.

APPEAL from an order entered at the Circuit dismissing the complaint herein.

February 1, 1872, Mary Ann Sutherland and her husband gave a bond and mortgage for \$3,000 to John J. Drake, who subse-

quently assigned them to Arthur Childs. On the 7th of September, 1872, the defendant entered into the following agreement:

In consideration of the sum of one dollar, to me in hand paid by Arthur Childs, the receipt whereof is hereby acknowledged, and of other valuable considerations, I, Frederick W. Starr, of the city of Brooklyn, do, for myself, my heirs, executors and administrators, guarantee the payment of principal and interest of a certain bond and mortgage, made by Mary Ann Sutherland and Spencer Sutherland, her husband, dated February 1, 1872, to secure the sum of \$3,000 and interest, which said mortgage was recorded in the Kings county register's office, in liber 1052 of mortgages, page 154, February 6, 1872, to Arthur Childs, the present owner and holder of said bond and mortgage, his executors and administrators, according to the terms and conditions thereof, together with any costs, allowances and disbursements attending a foreclosure of the same.

Subsequently Childs assigned the bond and mortgage, but not the guarantee, to the plaintiff's testatrix. A deficiency having arisen upon the foreclosure of the bond and mortgage, this action was brought to recover upon the guarantee, the plaintiff claiming that it was collateral to the mortgage and passed with it.

John H. Knaebel and Charles H. Smith, for the appellant. The assignment of the bond did, "*ex proprio vigore*," carry the title in the guarantee, to the assignee. (*Pattison v. Hull*, 9 Cow., 747; *Craig v. Parkis*, 40 N. Y., 181; *Merritt v. Bartholick*, 36 id., 44; *Dorsheimer v. Nichols*, 1 Abb. Ct. App., 519; *Parmalee v. Dann*, 23 Barb., 461; *Jackson v. Blodget*, 5 Cow., 202; *Jackson v. Willard*, 4 Johns., 43; 9 Wend., 80.) The omission in the guarantee of the word "assigns" does not render the same non-assignable. (*Averill v. Taylor*, 8 N. Y., 44; *Gould v. Ellery*, 39 Barb., 163.)

Johnston & Strauss, for the respondent.

GILBERT, J.:

The answer does not admit that the guarantee was given as security for the payment of the bond. If it did, there would

be no question that it passed to the plaintiff as an incident to the debt assigned to him.* The bond being the principal obligation, a guarantee of the payment thereof, generally, would pass with an assignment of the bond, as a security collateral thereto; and a formal assignment of the guarantee would not be necessary to vest the same in an assignee of the bond.† But the answer sets up that the guarantee was given to indemnify Mr. Childs, the plaintiff's assignor, personally. No evidence having been given besides the guarantee itself, its legal effect can be determined only by an interpretation of the language thereof. The defendant thereby guarantees the payment of the bond to "Arthur Childs, the present owner and holder of said bond," etc. We think the legal import of this language is an engagement to Childs only. The defendant, being a mere surety, cannot be bound beyond the scope of his engagement. Thus, in *Wright v. Russell*,‡ a bond conditioned for the honesty of one Baird, a clerk, was given by the defendant to one Wright, the employer of the clerk. Wright, subsequently to the giving of the bond, entered into partnership with one J. D. It was held that the defendant was no longer liable on the bond. The court said, "the condition was confined to Wright only, and the breach assigned is the non-payment of the money to Wright and Delafield, which is not within the condition. So, in *Barker v. Parker*,§ it was held that a bond with a condition that a clerk should faithfully serve and account for money to the obligee and his executors, did not make the obligor liable for money received by the clerk in the service of the obligee's executor. Lord MANSFIELD said: "The bond in question is relative to the service with Pyott, the testator. It was given as an indemnity that the clerk should be faithful to him."¶ The principle of all the cases on this subject is, that a surety is not to be held beyond the precise terms of his contract. If the contract was entered into to assist a friend, it is to be construed strictly, as mere matter of legal right.

Having no means of ascertaining the actual intentions of the par-

* *Jackson v. Blodget*, 5 Cow., 202; *Craig v. Parkis*, 40 N. Y., 181.

† *McLaren v. Watson's Exrs.*, 26 Wend., 425. ‡ 3 Wils., 530. § 1 T. R., 287.

[See, also, *Weston v. Barton*, 4 Taunt., 673; *Pemberton v. Oakes*, 4 Buss., 154; *Chapman v. Beckington*, 3 Q. B., 708; *Gates v. McKee*, 3 Kern., 237; *Ludlow v. Simond*, 2 Cal. Cas., 1.

ties to the contract in this case besides the words they used, we can only give effect to those words according to their plain and natural import. So construed, the guarantee is that the bond should be paid to Childs, his executors and administrators. We cannot say that it was given for the purpose of facilitating a sale or other disposition of the bond, or that it was intended to be aught but an indemnity to Childs and his representatives against loss. Childs having put it out of his power to receive payment, the purpose of the guarantee has been accomplished, and the guarantor is discharged.

The judgment must be affirmed.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment affirmed, with costs.

MEMORANDA

OF

CASES NOT REPORTED IN FULL.

ALEXANDER M. C. SMITH *v.* THE MANHATTAN INSURANCE COMPANY.

*Insolvent corporation — distribution of assets of — when creditor may be allowed to
present claim.*

Where, at the time of the appointment of a receiver of an insolvent corporation, a suit is pending against it, the plaintiff therein may, at any time before the entry of a final decree excluding all creditors who have not presented their claims, be permitted to come in, prove his claim, and participate equitably in the distribution of the fund still in the hands of the receiver.

Matter of Harmony Ins. Co. (9 Abb. [N. S.], 847) followed.

But where in such case the receiver had no actual notice of the petitioner's claim before making the second dividend, and has reserved no fund applicable specifically to the payment thereof, it is error to require him to pay to the petitioner his proportion of such dividend.

APPEAL from an order made at the Special Term, allowing the Milwaukee and St. Paul Railroad Company to make proof of its claim against the defendant.

Thomas H. Hubbard, for the appellant.

C. W. Bangs, for the respondent.

Opinion by GILBERT, J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Order modified, and as modified affirmed, with costs.

WILLIAM H. JENKS AND ANOTHER, APPELLANTS, v.
CATHARINE BROWN, IMPLEADED, RESPONDENT.

Mechanics' lien — cancellation of contract by owner — effect of, on rights of subcontractor.

The plaintiffs furnished certain materials used by one Phillips, in erecting a building upon land belonging to the defendant, Brown, and received an order upon her, which she accepted, to be paid out of the third payment to become due to the contractor, Phillips. Subsequently, and before the third payment became due, Phillips and defendant, Brown, canceled the contract. Afterward plaintiffs, in ignorance of such cancellation, filed a mechanics' lien under the act of 1862 (p. 947), for the enforcement of which this action was brought. Upon the trial, the plaintiffs were nonsuited. *Held*, that this was error; it should have been left to the jury to decide whether the contract was canceled in good faith, and, if not, how much was due upon it.

Quere, whether plaintiffs' lien would be affected by such cancellation.

APPEAL from a judgment in favor of the defendant, entered upon an order dismissing the plaintiff's complaint.

John R. Kuhn, for the appellants.

———, for the respondent.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment reversed and new trial granted, costs to abide the event.

MARGARET FARRELL, RESPONDENT, v. JAMES C.
CORBETT, APPELLANT.

Rescission of contract — restoration of what has been received.

This action was brought by the plaintiff to restrain the defendant from enforcing a chattel mortgage which she had given to him to secure \$350, the purchase-price of a lease, liquor store and the contents thereof, sold by the defendant to the plaintiff, and of which the latter had taken possession. The plaintiff claimed

SECOND DEPARTMENT, MARCH TERM, 1875.

to rescind the contract and to have the mortgage declared void by reason of fraudulent representations of the defendant in respect to the business of the store and the rent of the premises. *Held*, that the plaintiff could not maintain the action, as she had failed to restore to the defendant the property received from him under the contract.*

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

John Flanagan and *James C. Anderson*, for the appellant.

—————, for the respondent.

Opinions by TAPPEN, J., and BARNARD, P. J.

BARNARD, P. J., dissented.

Present — BARNARD, P. J., TAPPEN and GILBERT, JJ.

Judgment reversed and new trial ordered at Circuit, costs to abide the event.

HELEN H. VAN KEUREN, APPELLANT, v. MARGARET CORKINS AND OTHERS, RESPONDENTS.

4	129
80	209

Mortgage — payment of, by mortgagor to mortgagee after assignment, without notice.

Payments made by a mortgagor to a mortgagee, after the latter has assigned the mortgage and parted with all his interest therein without notice of such assignment, are valid.†

Under some circumstances the omission of a mortgagor, when paying off his bond and mortgage, to require a delivery up of the securities, may raise a presumption that the payment was not made in good faith.‡ But no such presumption can arise where the assignee allows the mortgage to remain in the hands of the mortgagee, and permits him to receive payments of principal and interest thereon.

*Pullman v. Alley, 53 N. Y., 637; Cobb v. Hatfield, 46 id., 533; Sinclair v. Neill, 8 Sup. Ct. Rep. (1 Hun), 80.

†Reed v. Marble, 10 Paige, 413.

‡Brown v. Blydenburgh, 7 N. Y., 140; Doubleday v. Kress, 50 id., 410.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

Hulse, Little & Finn, for the appellant.

E. A. Brewster, for the respondents.

Opinion by GILBERT, J.

Present — GILBERT and TAPPEN, JJ.

Judgment affirmed, with costs.

RICHARD H. BOWNE, TRUSTEE, v. PHEBE J. UNDERHILL AND OTHERS.

Will — “children” — construction of word.

The testatrix, by her will, gave to her executor certain real and personal property in trust, among other things to apply the income thereof to the use of her niece, “Phebe J. Underhill, wife of Edmund Underhill, during the joint lives of the said Edmund Underhill and Phebe J., his wife; from and after the death of either of them, the said Edmund and Phebe J., then to apply the same to the use of the survivor of them, and the *children* of them the said Edmund and Phebe J. Underhill, during the lifetime of such survivor in equal proportions; upon the decease of such survivor, then upon trust to divide the said trust estate equally among all the children of the said Phebe J. Underhill, who may then be living and the lawful issue of any who may then be dead, *per stirpes*, and not *per capita*.” Held, that the word “children,” as used in the will, included grandchildren, and that upon the death of Edmund Underhill, his grandchildren, whose parent was dead, were entitled to their parent’s share of the income during the life of Phebe J. Underhill.

CONTROVERSY submitted without action under section 372 of the Code.

Benj. D. Silliman, for the plaintiff.

E. T. Schenck, for the defendant John F. Underhill.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment accordingly.

JEANNETTE H. HAMMOND, BY HER GUARDIAN, AND OTHERS,
APPELLANTS, v. WILLIAM M. DEAN.

Costs of attorney—order directing payment of—how enforced.

The plaintiff, in an action for breach of promise of marriage, being desirous of changing her attorney, an order was entered directing such change to be made, and providing that \$200 costs of the former attorney be made a prior lien on any judgment recovered, and that the same should be paid out of the first money received thereunder. Subsequently the suit was settled, and \$2,900 paid to the attorney. Upon the application of the first attorney, an order was made directing the plaintiff and the second attorney, to pay over \$200 to him. *Held* that the order was proper, and should be affirmed.

APPEAL from an order directing the plaintiff and her attorneys to pay over certain moneys received in this action.

Breen & Spellissy, for the appellants.

———, for the respondent.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., and GILBERT, J.

Order affirmed, with ten dollars costs.

JOSEPH H. HAVENS, RESPONDENT, v. THE NATIONAL CITY
BANK OF BROOKLYN, IMPLEADED, ETC., APPELLANT.

Code, § 294—National Bank—power of State court over—bankruptcy.

Where a judgment has been recovered against an assignee in bankruptcy, an order cannot be made, under section 294 of the Code, requiring a bank, a depository of United States funds, to pay over to the judgment creditor money belonging to the estate of the bankrupt, deposited by the assignee with it.

APPEAL from an order denying a motion to vacate an order made in supplementary proceedings, requiring the appellant to pay over certain money to the respondent's attorney.

W. H. Hollis, for the appellant.

John H. Bergen and *E. L. Sanderson*, for the respondent.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Order reversed, with ten dollars costs.

4	132
73	424

THEODORE MINER, RESPONDENT, v. THOMAS GARDINER,
JR., APPELLANT.

Inspection of books—when not allowed—Value of services in keeping books—how proved.

In an action brought to recover for services rendered as book-keeper, an inspection of the books of the defendant should not be ordered to enable the plaintiff to have them examined by an expert, so that he may testify from their appearance as to the value of the services rendered in keeping them. The proper way is to prove the services and the time occupied in performing them, and then prove their value.

APPEAL from an order denying a motion made by defendant for a reference, and from an order granting an inspection of books of the defendant.

Roe & Macklin, for the appellant.

Wm. Dudley Foulke, for the respondent.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., and GILBERT, J.

Order denying reference affirmed with costs; order granting inspection reversed, with costs.

LUTHER E. MANSFIELD, RESPONDENT, v. CHARLES H.
KERNER AND ANOTHER, APPELLANTS.

*Contract — specifications annexed to — when compliance with must be proved — Answer
— allegations of — when insufficient as evidence for plaintiff.*

This action was brought to recover for work performed in erecting an elevator, "as per specifications annexed to the written contract." The answer alleged that the elevator was to be constructed "in accordance with certain drawings and specifications," and then set forth certain of the requirements thereof. Upon the trial the plaintiff did not prove the contract and specifications, but read a portion of the answer, referring, in general terms, to the contract, and declared that this was the agreement which he accepted, and he was allowed to recover thereon. *Held*, that this was error; that he should have been compelled to prove the contract and specifications, and compliance therewith.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

George H. Forster, for the appellants.

Frank Reynolds, for the respondent.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment reversed and new trial granted, costs to abide the event.

PETER BOOS, RESPONDENT, v. THE WORLD MUTUAL LIFE
INSURANCE COMPANY, APPELLANT.

4 133
30 p 287

Evidence — when to be passed upon by court, and when by jury — Breach of warranty should be pleaded.

Whether there is any evidence in the case is a question for the court; whether there is sufficient evidence to justify a verdict is a question for the jury. In order to avoid a policy of insurance on the ground of a breach of warranty, such breach should be pleaded.

APPEAL from a judgment in favor of plaintiff, entered on the verdict of a jury at the Kings county Circuit.

This action was brought by plaintiff, as assignee of a policy

of insurance, issued by the defendant upon the life of his (plaintiff's) father.

The defense was that Valentine Boos (the father) had falsely answered certain questions. The General Term, after a review of the evidence, was of opinion that the case was a proper one to be submitted to the jury, and affirmed the judgment, with costs.

Joshua M. Van Cott and *Wm. P. Prentice*, for the appellant.

John H. Bergen, for the respondent.

Opinion by GILBERT, J.

Present — GILBERT and TAPPEN, JJ.

Judgment affirmed, with costs.

4 134
30ap301

HENRY DAY, RESPONDENT, v. CHRISTOPHER MOONEY
AND OTHERS, APPELLANTS.

Mortgage—merger of—Acceptance of deed—presumption as to.

The merger of a mortgage, when the fee of the mortgaged premises is acquired by the mortgagee, does not take place when such is not the intention of the parties to the transaction out of which it is claimed to arise. *

An acceptance of a deed will not be presumed from its being made and recorded by others, without the sanction of the grantee. †

APPEAL from a judgment in favor of plaintiff, entered on the report of a referee, in an action brought for the foreclosure of a mortgage.

———, for the appellants.

Daniel Lord, Jr., for the respondent.

Opinion by GILBERT, J.

Present — GILBERT and TAPPEN, JJ.

Judgment affirmed, with costs.

* *Clift v. White*, 12 N. Y., 519; *Morris v. Whitcher*, 20 id., 41; *Millsbaugh v. McBride*, 7 Paige, 509; *Skeel v. Spraker*, 8 id., 182.

† *Chouteau v. Suydam*, 21 N. Y., 192; *Fonda v. Sage*, 48 id., 174; *Wilsey v. Dennis*, 44 Barb., 355.

THE 'AMERICAN SILK WORKS, RESPONDENT, v. I. J.
SALOMON, APPELLANT.

Corporations — acquisition of property before incorporation completed — subscriptions may be in chattels.

Corporations may acquire title to money paid upon subscriptions to capital stock before the corporation has a legal existence, and such subscriptions may be in the form of property other than money.

APPEAL from a judgment in favor of the plaintiff herein, entered on the report of a referee. The action was brought for the alleged conversion by the defendant of certain steam gas-pipes, etc., the property of the plaintiff.

Gardiner & Goodhart, for the appellant.

Williams Brothers, for the respondent.

Opinion by GILBERT, J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

BARNARD, P. J., dissented.

Judgment affirmed, with costs.

GEORGE W. PLATT, APPELLANT, v. WILLIAM A. PARKER
AND THEODORE F. PIER, RESPONDENTS.

Bankruptcy — omission of name of creditor in debtor's schedule — effect of — fraud must be shown.

The omission from the schedule of the debtor, of the name or claim of a creditor, does not invalidate the discharge of the debtor in bankruptcy, unless it be shown to have been omitted fraudulently.

APPEAL from a judgment in favor of the defendants, entered on the report of a referee, dismissing the plaintiff's complaint.

Edward S. Clinch, for the appellant.

Wm. A. Jenner, for the respondents.

Opinion by TAPPEN, J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment affirmed, with costs.

GRACE TATHAM, APPELLANT, v. THE COMMERCE
INSURANCE COMPANY OF ALBANY, RESPONDENT.

Policy of insurance — when avoided by sale of property.

This action was brought upon a policy of insurance, issued by the defendant, which contained a clause providing that "if the property be sold or transferred, or any change take place in title or possession, except in case of succession by reason of the death of the assured, whether by legal process or judicial decree or voluntary transfer or conveyance, * * * the policy shall be void." After the issuing of the policy, the plaintiff conveyed the property insured thereby to Winn & Weaver, who held a mortgage thereon, by whom an agreement was executed, giving to the plaintiff possession of the property for one year, and also the option to pay \$13,500 during said time, "as a consideration for the reconveyance. If payment not made, said property is to become fully vested" in Winn & Weaver. *Held*, that the transaction was a sale, and not a mortgage, and that the policy was avoided thereby.

APPEAL from a judgment in favor of the defendant.

———, for the appellant.

———, for the respondent.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., and GILBERT, J.

Judgment affirmed, with costs.

THEODORE B. GATES AND ANOTHER, APPELLANTS, v.
JOSHUA M. WHITCOMB AND OTHERS, RESPONDENTS.

When an owner of land agrees to sell it to another, and advances him money with which to build upon the premises sold, and, after completion of the houses, the builder is to secure the purchase-price and the advances by mortgage, the relation of owner and contractor does not subsist as between the parties, under the lien act.* In such cases the person who agrees to purchase, builds by permission of the owner, and the property is chargeable with the lien until the deed is actually delivered, without regard to the terms of the contract of purchase.

APPEAL from a judgment in favor of defendant dismissing plaintiff's complaint. The action was brought to foreclose a mechanic's lien.

Theodore B. Gates, appellant, in person.

William W. Goodrich, for the respondents.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment reversed and a new trial granted at Special Term, costs to abide event.

GEORGE F. PERKINS AND ANOTHER, RESPONDENTS, v.
ALFREDERICK S. HATCH, APPELLANT.

APPEAL from a judgment in favor of the plaintiffs, entered on the report of a referee.

The plaintiffs furnished to a corporation known as the "Sunday School Workmen's Association," paper on which a newspaper was printed, known as the "Sunday School Workman," and they recovered judgment against the association therefor, to the amount of \$1,443, on the 16th February, 1872.

After the return of execution against the judgment debtor unsat-

* *Hart v. Wheeler*, 1 N. Y. S. C. (T. & C.), 408.

isified, they brought this action against the defendant as a stockholder, and alleged that the defendant was liable under section 10 of the law of 1848, providing for the formation of corporations, etc., in consequence of the failure of the corporation to procure the amount of its capital stock to be subscribed and paid in.

The defendant contended that the association was not legally incorporated, alleging the proceedings for that purpose to have been defective; and further, that the indebtedness of the association was not established, and that he, the defendant, was not a stockholder. The referee found for the plaintiffs.

The capital stock was not paid up, and nearly fifty per cent thereof remained unpaid.

The court at General Term was of opinion that the certificate of incorporation to which the defendant was a party, could not be questioned by him in respect to any irregularities, if there were any such; * that the corporation was liable in assumpsit for goods received and used in its business to the same extent as a natural person; † that the defendant was a stockholder; that his subscription became obligatory; that his payments on account thereof, made him a member with corresponding liabilities; ‡ that the referee properly refused to charge against the plaintiffs, as a payment, a note signed and issued by two officers of the company for \$600 on account of plaintiffs' claim, such note being unpaid and protested, and plaintiffs expressly averring the facts in their complaint, and the proof supporting such averment.

L. E. Chittenden, for the appellant.

Thayer & Shoudy, for the respondents.

Opinion by TAPPEN, J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment affirmed, with costs.

* *Hyatt v. Esmond*, 37 Barb., 606, and cases cited; *B. and A. R. R. v. Cary*, 26 N. Y., 78.

† *Danforth v. Schoharie T. P. Co.*, 13 Johns., 227; *Hooker v. Eagle Bank of Rochester*, 30 N. Y., 86.

‡ *Stanton v. Wilson*, 2 Hill, 153; *Spear v. Crawford*, 14 Wend., 20; also, 1 N. Y., 336; 16 id., 451; 22 id., 551.

CHRISTIAN G. VOLTZ, RESPONDENT, v. ABEL T. BLACKMAR, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered at Dutchess county Circuit, on the decision of the court without a jury.

The action was brought for the conversion of a certificate of deposit for \$4,000. The plaintiff had been clerk with power of attorney to draw checks for the defendant. The relation being about to terminate, plaintiff drew a check on defendant's bank account for \$4,000, and thereon obtained the certificate in question, \$4,000 being the amount due him, according to plaintiff's calculation, from defendant. The defendant had plaintiff arrested, and the certificate was taken from him by the police and delivered to defendant; the defendant having previously received from plaintiff the defendant's note for \$3,000 canceled, the \$3,000 being included in the \$4,000 certificate, which note defendant retained.

The judge trying the cause found that the plaintiff, honestly believing the defendant indebted to him in the sum of \$4,000, by mistake and not otherwise, drew the check and applied the same to such indebtedness, and notified defendant at once thereof, and defendant authorized him to draw a check for the \$3,000 note, but for no more until a settlement was had. The defendant was really indebted to plaintiff \$156 less than the \$4,000. The court at General Term was of opinion that a cause of action for conversion was made out, and that defendant having given a cause of action to plaintiff by a forcible seizure and conversion of the property, no lien for the \$156 interest in the certificate, accrued to defendant from his tortious possession; and that as to damages, the amount due upon the certificate at the time of conversion was the measure.*

Lewis & Gurney, for the appellant.

Nichols & Allen, for the respondent.

Opinion by TAPPEN, J.

* *Ingalls v. Lord*, 1 Cow., 240; 1 Smith's Leading Cases, 605.

Present — GILBERT and TAPPEN, JJ.

Judgment affirmed, with costs.

CHRISTIAN G. VOLTZ, RESPONDENT, v. ABEL T. BLACKMAR, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered at the Dutchess county Circuit, and from an order denying a motion for a new trial.

The plaintiff on a trial at the Dutchess Circuit in an action for false imprisonment, assault and battery, had a verdict for \$4,250, and the court made an extra allowance of five per cent thereon in addition to the costs. The defendant seeks a new trial for alleged errors at the trial, and for excessive damages. The General Term found no errors that could be held at all sufficient to disturb the verdict, nor, under the circumstances of the case, did it consider the damages excessive. It further *held*, that the extra allowance was in accordance with the established practice and usage in the courts of the district.

Lewis & Gurney, for the appellant.

Nichols & Allen, for the respondent.

Opinion by TAPPEN, J.

Present — GILBERT and TAPPEN, JJ.

Judgment and order denying new trial affirmed, with costs.

WYNDHAM THOMAS, APPELLANT, v. ALVIN HIGGINS,
RESPONDENT.

APPEAL from a judgment in favor of defendant, entered on a referee's report, dismissing plaintiff's complaint.

The action was brought to recover for work, labor and materials, furnished under an oral contract to defendant, and the chief defense was that the work was not done in a workmanlike manner, and that the plaintiff had not performed his contract. The court at General Term, without any discussion of the reasons therefor, was of opinion that certain evidence as to the value of the work and the direction of the defendant as to the same, offered by the plaintiff, had been improperly excluded by the referee, and reversed the judgment.

A. P. Hinman, for the appellant.

S. F. & F. H. Cowdrey, for the respondent.

Opinion by TAPPEN, J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment reversed and new trial granted at Circuit, costs to abide event.

IN THE MATTER OF THE FINAL SETTLEMENT OF THE ACCOUNTS OF
ROBERT ABERCROMBIE, EXECUTOR, ETC., APPELLANT.

APPEAL from a decree of the surrogate of the county of Westchester.

The auditor, to whom it was referred to take and state the accounts of the appellant, having filed a report which the surrogate regarded as incomplete, he directed him to make a further report, setting forth certain facts to which his attention was called,

as they appeared in the evidence already taken by him. The General Term *held*, that there was no error in requiring the auditor to make a further report, and affirmed the decree.

Wm. F. Purdy, for the appellant.

L. T. Yale, for the respondent.

Opinion by GILBERT, J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Decree affirmed, with costs.

THOMAS W. LENTON, AN INFANT, BY JOHN LENTON,
HIS GUARDIAN, RESPONDENT, v. C. GODFREY GUNTHER,
APPELLANT.

APPEAL from a judgment in favor of the plaintiff, and from an order denying a motion for new trial.

The action was brought to recover damages caused by the alleged negligent act of the defendant's servant in throwing a jet of steam suddenly upon the plaintiff's horse and causing him to run away. The General Term was of opinion that the evidence was sufficient to sustain the verdict, and affirmed the judgment and order.

Winfield & Leeds, for the appellant.

D. P. Barnard, for the respondent.

Opinion by GILBERT, J.

Present — BARNARD, P. J., and GILBERT, JJ.

Judgment and order denying a new trial affirmed, with costs.

BARNABAS C. TOMPKINS, APPELLANT, v. HARRISON
BARNES, RESPONDENT.

APPEAL from a judgment in favor of the defendant, entered upon an order dismissing the complaint herein. The General Term held that there was evidence in the case which should have been submitted to the jury, and that it was error to grant a non-suit.

Robert S. Hart, for the appellant.

Close & Robertson, for the respondent.

Opinion by GILBERT, J.

Present — BARNARD, P. J., and GILBERT, J.

Judgment reversed and new trial granted, costs to abide the event.

WILLIAM DONALDSON, RESPONDENT, v. JAMES H.
TRUESDELL, APPELLANT.

APPEAL from a judgment of the Westchester County Court affirming a judgment of a justice of the peace in favor of the plaintiff.

The action was brought to recover on a check given by defendant, and claimed by him to be an accommodation check, and for which defendant claimed that the plaintiff, the indorsee, had not given any value. The General Term was of opinion that there was proof from which the justice was justified in finding that value had been given for the check, and affirmed the judgment.

J. S. Millard, for the appellant.

Wm. F. Purdy, for the respondent.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Judgment affirmed, with costs.

WILLIAM REYNOLDS, RESPONDENT, v. JOHN GILCHREST
AND ANOTHER, APPELLANTS.

THE appeal papers in the case contain a notice of appeal from an order of the county judge of Westchester county, made in proceedings supplementary to execution founded on a judgment entered in this action, said order refusing to dismiss such proceedings, and sustaining an attachment against the defendant Gilchrest, for an alleged contempt in said proceedings.

The General Term found in the appeal papers no such order, and dismissed the appeal, without costs.

Wm. F. Purdy, for the appellant, Gilchrest.

J. S. Millard, for the respondent.

Opinion by BARNARD, P. J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Appeal dismissed, without costs.

JOHN GREEN, APPELLANT, v. ELISHA KING, RESPONDENT.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

The only question presented by this appeal was, whether or not the evidence in the case was sufficient to sustain the findings of the referee. The General Term *held* that it was, and affirmed the judgment.

James C. Anderson, for the appellant.

E. A. Carpenter, for the respondent.

Opinion by TAPPEN, J.

Present — BARNARD, P. J., TAPPEN and GILBERT, JJ.

Judgment affirmed, with costs.

THOMAS E. SMITH, RESPONDENT, v. THE BOARD OF
SUPERVISORS OF WESTCHESTER COUNTY,
APPELLANT.

APPEAL from an order made at the Special Term, referring this cause to a referee to hear and determine. The General Term reversed the order on the ground that the action was not referable.

Close & Robertson, for the appellant.

— — —, for the respondent.

Opinion by GILBERT, J.

Present — BARNARD, P. J., GILBERT and TAPPEN, JJ.

Order reversed, with ten dollars costs.

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THIRD DEPARTMENT
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GENERAL TERM,
April, 1875.

**ELIZABETH HAWKS, APPELLANT, v. GEORGE W. SWETT
AND OTHERS, RESPONDENTS.**

*Decree — when parties to, bound by — Assignees of patent — effect of invalidity of
patent on agreement entered into by — Letters patent — what conferred by.*

In 1867 the plaintiff, to whom letters patent for an improvement in the manufacturing of stoves had been issued, assigned them to defendants, who agreed to pay her a certain sum for each stove manufactured thereunder, she agreeing to protect them in the exclusive enjoyment of the privileges thereby conferred. In 1869 she surrendered these letters, and obtained a reissue, which was subsequently assigned to the defendants, subject to the agreement for compensation. Subsequently one Goodfellow, claiming to be the first inventor, procured letters to be issued to him, which he afterward assigned to the defendants, who sold the rights acquired under the assignment from the plaintiff, to one Burtis. Subsequently a suit was commenced by the defendants against the plaintiff and Burtis, in which a decree was entered deciding that the letters patent issued to the plaintiff were void, and of no effect. This action was brought to obtain the compensation agreed to be paid by the defendants to this plaintiff upon her assignment to them of the said letters. *Held* (1), that the decree in the suit brought in the United States court established conclusively, as between the parties to this action, that the letters patent were void, and that defendants were not estopped from setting up such invalidity; (2), that the letters patent being void, there was no consideration for the promise of the defendants to pay for stoves manufactured thereunder; (3), that the assignment by the defendants of their rights thereunder, did not estop them from setting up this failure of consideration as against the plaintiff.

Saxon v. Dodge (57 Barb., 84) followed; *Thomas v. Quintard* (5 Duer, 80) distinguished.

Letters patent for an invention confer nothing, except a right to bring actions, and thereby prevent persons from doing what they might otherwise lawfully do.

APPEAL from a judgment in favor of the defendants, entered upon an order dismissing the plaintiff's complaint.

This action was brought to recover certain royalties or license fees, claimed to be due the plaintiff by virtue of a written agreement. The defense was, that the covenant to pay royalties was void for want of consideration.

James Lansing, for the appellant. The defense of fraud is not available in this case, because it is not alleged in the answer that the defendants offered to restore the plaintiff to her former condition on the discovery of the alleged fraud, which is indispensable to the defense. (*Devendorf v. Beardsley*, 23 Barb., 656.) Their own assignment precludes the defendants from saying that what they sold was valueless, and therefore unnecessary to return. (*Thomas v. Quintard*, 5 Duer, 80.) So long as the defendants elected to keep the contract on foot they are bound by it, and can only avail themselves of a breach by way of recoupment. (*Pitts v. James*, 15 Barb., 310.) In order to defend for breach of warranty of title there must be an eviction, either a recovery by or an enforced surrender to the true owner. This applies to personal as well as real property. (*Case v. Hall*, 24 Wend., 102; *Burt v. Dewey*, 40 N. Y., 283; *Bordwell v. Collie*, 45 id., 494.) The defense of failure of consideration is not available, since the defendants, by parting with the patent for a valuable consideration, are precluded from setting up want of value in the patent, and have disabled themselves from restoring the plaintiff to her former condition. (*Thomas v. Quintard*, 5 Duer, 80; *Winslow v. Buel*, 1 How., 373; *Parley v. Balch*, 23 Pick., 283.) The decree was improperly admitted in evidence, because, being new matter which confessed and avoided the plaintiff's title, it should have been set up in the answer. (*O'Toole v. Garvin*, 1 Hun, 92; *Brazill v. Isham*, 12 N. Y., 9.) It is not admissible as evidence to prove the fact that the plaintiff's patent is valueless: First, because no such defense is set up in the answer; second, if it were, the statute which authorizes the action in the United

States court, limits the effect of the decree so that the patent may, under certain circumstances, still be of value. (Rev. Patent Laws, approved July 8, 1870; see appendix to Patent Laws, p. 17, § 58; *Johnson v. Titus*, 2 Hill, 606.) The conveyance of the patent to the defendants being made upon a nominal consideration, with the real consideration to be paid by the defendants from working the patent, it became a joint venture, and the plaintiff and defendants are partners in the benefits of the investment. (*Taylor v. Hare*, 4 Bos. & Pull., 260.) And the defendants, when called upon to account, having received the benefit, are estopped from denying the plaintiff's title or retaining the profits to their own use. (*Kinsman v. Parkhurst*, 18 How. [U. S.], 289.)

Esek Cowen, for the respondents. A promise or note given in consideration of an assignment of the whole or a part of letters patent which are void for want of novelty, is given without consideration and cannot be enforced. That is clearly so in this State. (*Cross v. Huntly*, 13 Wend., 385; *Head v. Stevens*, 19 id., 411; *McDougall v. Fogg*, 2 Bosw., 387; *Saxton v. Dodge*, 57 Barb., 84, 114; *Dickinson v. Hall*, 14 Pick., 220; *Earl v. Page*, 6 N. H., 480; *Davis v. Bell*, 8 id., 503; *Dunbar v. Marden*, 13 id., 317; *Geiger v. Cook*, 3 Watts & Serg., 270; *Durst v. Brockway*, 11 Ohio, 471; *Fallis v. Griffith*, Wright, 303; *Mulliken v. Latchem*, 7 Blackf., 138; *McClure v. Jeffrey*, 8 Ind., 82.) A complete answer to the claim that the defendants were estopped by the assignment to them, or the assignment from them, is that the judgment between the same parties was conclusive upon that point. (*LeGuen v. Gouverneur*, 1 Johns. Cas., 436; *Embury v. Conner*, 3 N. Y., 511, 522; *Haire v. Baker*, 5 id., 357; *Davis v. Tallcot*, 12 id., 184.)

LEARNED, P. J.:

The first question is, whether the decree of the United States court was admissible under the pleadings. The answer is not well drawn, but it sets up want of consideration and worthlessness of the patent. There could be no doubt as to the intended defense. This decree between the same parties was good evidence of these facts.* If necessary to amend the answer so as to set up the

* *Gates v. Preston*, 41 N. Y., 118.

decree by way of supplement, this could have been done at the trial by the permission of the court; for the plaintiff could not be misled. She was a party to the action in which the decree was taken, and appeared therein. *

Another objection taken to the admission of the decree was, that the plaintiff and defendants were jointly interested in the invention, and the defendants are therefore estopped from setting up an adverse title. The bill of complaint in which that decree was obtained, to state it briefly, set forth that Elizabeth Hawks, the present plaintiff, having fraudulently obtained letters patent, assigned the same to Swett and others, the present defendants; that they assigned them to one Burtis; that one Goodfellow was the real inventor of the alleged improvement, and had obtained letters patent therefor. Swett and others, these present defendants, therefore brought that action against Elizabeth Hawks, the said Burtis and one Marston, to have the letters patent issued to this present plaintiff declared void, etc.

Now, if it be so, that the present defendants, having taken an assignment from this present plaintiff, could not legally maintain that action, such defense should have been interposed there. Here, it is too late. That decree is a decision that the plaintiffs therein, the present defendants, were not estopped from setting up the adverse title; that is, I mean they were not estopped in that action.

The most important point, however, is the objection taken on the ground of the immateriality of that decree. That objection substantially raises the real question of the case, which also came up on the exception to the nonsuit.

The facts are briefly these: In 1867, letters patent for an invention were issued to the plaintiff. In the same year she entered into an agreement by which she assigned them to Swett, Perry, Nuttall and Marston. Nuttall has since assigned his interest to Marston; and Swett and Perry have assigned an interest to Quimby. By that agreement, the assignees were to pay her fifty cents on every stove, etc., manufactured and sold under said letters patent. She guarantied the validity and priority of the letters patent; agreed to protect the assignees in the exclusive enjoyment of all

* See, also, *Rinchey v. Stryker*, 28 N. Y., 45.

rights and privileges conferred; failing to do which all payments were to cease. In 1869, she surrendered the letters and obtained a re-issue; and in 1870, she assigned to these defendants, Marston, Swett, Quimby and Perry, the said re-issue, subject to the aforesaid agreement for compensation.

In 1869, one Goodfellow applied for letters patent on this invention, alleging himself to have been the first inventor, and to have shown the invention to the plaintiff. An interference was declared; testimony was taken on the part of Goodfellow and of the plaintiff; a decision was rendered in favor of Goodfellow, by the examiners, which was affirmed by the examiners-in-chief, and by the commissioner of patents. The defendants acquired, by assignment, Goodfellow's right in the patent, and then commenced the action in the United States Circuit Court against the present plaintiff, one Burtis, and Marston. This plaintiff was duly served with process and appeared, and a decree was taken *pro confesso*, January 21, 1873. This adjudges that the letters patent issued to the plaintiff are wholly void, invalid, and of no effect, and that she was not the original and first inventor.

Now, this decree is conclusive between the parties, as to the matters in controversy—the facts necessary to sustain it.* The invalidity of the plaintiff's letters patent, and the fact that she was not the first inventor, are settled, as between these parties. The only question is, as to the effect which these established facts have on the present action.

In order that we should not be misled by any false analogy, it should be noticed that letters patent for an invention confer nothing except a right to bring actions, and thereby to prevent persons from doing what they might otherwise lawfully do. Mrs. Hawks, under her letters patent, had a right to sue any one who made stoves in a particular manner; and that was all that she had. If the patent was valid she could succeed in the action. The first agreement above mentioned was, in its real substance, an agreement that she would not sue the assignees if they would pay her fifty cents for each stove; and they agreed to pay her this sum in consideration that she would not sue. The whole basis of the

*The People v. Johnson, 38 N. Y., 63; Marsh v. Pice, 4 Rawle, 273; Hopkins v. Lea, 6 Wheat., 109; Gates v. Preston, *ut supra*.

agreement, therefore, is her right to maintain successfully an action against them. When it is decided that she has no such right, all the consideration of the agreement is gone; for, if she has no cause of action by reason of their manufacture of the stoves, an agreement not to bring such an action is of no value.

The counsel for the plaintiff have compared the transaction to the sale of property, real or personal. They insist that in order to defend an action for purchase-money, on the ground of a breach of warranty of title, there must be an eviction. But the difference in the case is, that there is no *thing* which passed to the defendants by this agreement; there is no *thing* of which they have had possession, or of which they could be evicted. In a loose sense, these patent rights are sometimes called *property*; but it will not answer to apply to them, without discrimination, the rules which apply to *things*. If the plaintiff had sold land to the defendants, with warranty, they might have enjoyed it until evicted. So, if she had sold them a chattel. But in this present case she has only agreed not to prevent them from manufacturing certain stoves; and, by the decision of the United States court, it appears that she could not have prevented them, if she had tried. Her assignment to them, if the patent were valid, gave them only a right to sue others. If it were invalid, it gave no right of action against any one.

It is said that the defendants have had the enjoyment of the patent, and have manufactured under it. But there was nothing to enjoy; and it cannot be said that they manufactured under a right, which, in fact, did not exist.

When certain defendants took a license from a patentee, on an agreement to pay certain license fees, so called, and gave a note therefor, the invalidity of the patent was held a good defense to the note.* In harmony with that decision are the cases of *Cross v. Huntly*,† *Head v. Stevens*,‡ and *McDougall v. Foss*.§ If the case of *Thomas v. Quintard*|| be contrary to these, it must be considered as overruled. But an examination of that case will show that there was no attempt to prove that the patent was invalid. The offer was to show that the article manufactured under

* *Saxton v. Dodge*, 57 Barb., 84.

† 19 Wend., 411.

‡ 2 Bosw., 387.

§ 19 Wend., 335.

|| 5 Duer, 80.

the same was of no value. That offer presented a question very different from that involved in this case. The defendants do not here offer to show that the stoves which they made were of no value; but they show that the plaintiff had no right to prevent the manufacture of these stoves by her pretended invention. Why, then, should they pay her for not doing what she could not do?

It is insisted further, by the plaintiff, that, as the defendants assigned their interest in this patent to Burtis, they are precluded from alleging its invalidity. It is not necessary to inquire whether such a rule would apply to the case of a patent utterly invalid. It is enough that, in an action where that objection, if valid, might have been urged — that is, the action in the United States court — the plaintiff's patent was adjudged invalid at the suit of these defendants.*

The judge was right in directing a verdict for the defendant, and the judgment and order denying a new trial should be affirmed.

BOARDMAN, J.:

The English decisions seem to hold, in cases like this, where the contract has been executed, and the defendants have had the benefit contracted for, they may not set up that the patent was void, and that there was no consideration to uphold it, since the contract gave no exclusive right; that in the absence of fraud or eviction, the defendants, having enjoyed the benefits contracted for, are bound to pay in accordance with their contract, though the patent be void, or the plaintiff not the inventor.† From the case of *Bartlett v. Holbrook*,‡ it would appear that the same rule obtains in Massachusetts.

The authorities cited by my brother LEARNED in his opinion, show the existence of a different rule of law within this State, and sustain the ruling of the Circuit, dismissing the plaintiff's complaint on the ground of a want of consideration. I therefore concur in affirming the judgment.

* *Davis v. Tallcot*, 12 N. Y., 184.

† *Taylor v. Hare*, 1 Mod. R., 260; *Hayne v. Maltby*, 3 T. R., 438; *Bowman v. Taylor*, 2 Adol. & El., 278 (29 E. C. L., 90); *Cutler v. Bower*, 11 Q. B. (63 E. C. L.), 972; *Laws v. Purser*, 38 Eng. L. and Eq., 48.

‡ 1 Gray, 114.

THIRD DEPARTMENT, APRIL TERM, 1875.

Present — LEARNED, P. J., BOARDMAN and POTTER, JJ.

Judgment affirmed.

WILLIAM E. MARSTON, APPELLANT, v. GEORGE W.
SWETT AND OTHERS, RESPONDENTS.

Letters patent — invalidity of — effect of, on agreement made by assignees — Defects in pleading.

An agreement was entered into between the plaintiff and defendants, the plaintiff and defendants being assignees of a patent for the manufacture of stoves, by which the plaintiff agreed that the defendants should have the exclusive right to manufacture thereunder, upon payment to him of a certain sum for each stove. Subsequently a suit was brought, in the United States court, by the defendants, against the plaintiff and others, in which it was decided that the letters patent were void. This action was brought to recover the sum agreed to be paid by the defendants. *Held* (1), that the joint interest of the parties, plaintiff and defendants, did not prevent the defendants from showing the invalidity of the letters patent; (2), that the decree in the former suit was conclusive as to the invalidity of the letters patent, and as to the right of the defendants to set up such invalidity as against the plaintiff; (3), that the patent being void, there was no consideration for the agreement to pay royalties to the plaintiff.

Outler v. Bower (11 Q. B., 973) distinguished.

Defects in pleading must be urged in the court below where amendments may be permitted.

APPEAL from a judgment in favor of the defendants, entered on a nonsuit, from an order directing judgment for defendants upon their counter-claim, and from an order denying a motion for a new trial.

This action was brought to recover certain "royalties" or license fees for the privilege of making and selling stoves under certain letters patent, of which the plaintiff was one-half owner at the time of making the contract to pay such royalties. The defense was, that the contract to license was void because not in writing, and that the patentee and assignor of the plaintiff, one Elizabeth Hawks, was not the first and original inventor of the patented device, but that the same was invented by one John H. Goodfellow, to whom, after a litigation, the priority had been awarded by the patent office. The answer also set forth a counter-claim for \$1,208.49, for which the defendants claimed judgment.

James Lansing, for the appellant. The contract alleged in the complaint is not within the statute of frauds. The contract was not one "that by *its terms* was not to be performed within a year from the making thereof." (2 R. S., 135, § 2, sub. 1; *Van Woert v. Albany and Susquehanna R. R. Co.*, 1 N. Y. S. C., 256.) The agreement was executed. (*Talmadge v. Rensselaer and Saratoga R. R.*, 13 Barb., 493; *Dodge v. Crandell*, 30 N. Y., 294; *McGlucky v. Butler*, 1 E. D. Smith, 618.) If a writing were necessary, it is not necessary that the pleading should allege that fact affirmatively. (*Livingston v. Smith*, 14 How., 492.) Where the agreement is admitted by failure to deny, no evidence to prove its existence is necessary. (*West v. American Exchange Bank*, 44 Barb., 178.) The judgment or decree of the United States Circuit Court, read in evidence in this case, if available as a defense, is new matter avoiding the plaintiff's demand, and must be alleged as well as proven. (*O'Toole v. Garvin*, 1 Hun, 92; *McCormick v. Pickering*, 4 Comst., 376; Code, § 149; *Brazill v. Isham*, 12 N. Y., 9; 2 Whit. Pr., 112.) But if the pleadings permitted the introduction of said decree, it is immaterial as evidence in the case. The parties being tenants in common of the patent, and the defendants, by virtue of the contract, being entitled to the exclusive use of said patent, the relation of lessor and lessee will arise. (*Mumford v. Brown*, 1 Wend., 52; *Cowper v. Fletcher*, 118 E. C. L., 462.) The relation of lessor and lessee of a patent right, is analogous to the relation of landlord and tenant. (*Bowman v. Taylor*, 2 Alderson & Ellis, 278; *Cutter v. Brown*, 11 Q. B., 140; *Laws v. Purser*, 38 Eng. L. and E., 48.) The defendants, having used and enjoyed the invention, are estopped from denying the title of the lessor during that time. (Same cases; also, *Bartlett v. Holbrook*, 1 Gray, 114; *Prevot v. Lawrence*, 51 N. Y., 219.) So long as the lessee is not disturbed he is bound to pay, even though the lessor's title be defective, or he be even without title. (Herman's Law Estop., 368; *George v. Putney*, 4 Cush., 354; *Prevot v. Lawrence*, 51 N. Y., 219.) Even an eviction is no defense as to accrued rent. (*Giles v. Comstock*, 4 N. Y., 270; *McKewen v. Whitney*, 3 Denio, 452.) When there is a common source of title, one of the tenants in common cannot, as against a joint owner, show that the common title is defective. (*Clark v. Crego*,

47 Barb., 600; *Jackson v. Streeter*, 5 Cow., 529; *Murphy v. Barnett*, 2 Murph., 25.) A lessor cannot avoid liability for rent by purchasing a paramount outstanding title. (Herman's Law Estop., § 360; *Sharpe v. Kelly*, 5 Denio, 431.) Neither can one tenant in common buy in an adverse title, so as to defeat the right of his co-tenant, but such purchase will inure to the benefit of his co-tenant. (*Phelan v. Kelly*, 25 Wend., 389; Herman's Law Estop., pp. 377, 558, 559.)

Esek Cowen, for the respondents. The contract set forth in the complaint not being in writing, it was void within the clause of the statute of frauds, which avoids contracts not to be performed within one year. (*Doyle v. Dixon*, 97 Mass., 208.) Neither part performance nor complete execution on one side, will take the case out of the statute. (*Lockwood v. Barnes*, 3 Hill, 128; *Bartlett v. Wheeler*, 44 Barb., 162.) Under section 11 of the patent act of 1836, which was in force at the time of the contract, every assignment of the exclusive right to make and use the thing patented, must be in writing in order to have any validity. (*Gibson v. Cook*, 2 Blatchf., 148.) The judgment, being conclusive between these parties, was evidence that the patent under which the pretended license was given never had any validity, and that there was no consideration for the promise of the defendants to pay royalties. (*Cross v. Huntly*, 13 Wend., 385; *Head v. Stevens*, 19 id., 411; *McDougall v. Fogg*, 2 Bosw., 387; *Saxton v. Dodge*, 57 Barb., 84, 114; *Clum v. Brewer*, 2 Curtis, 524.)

LEARNED, P. J.:

This case is like that of *Hawks* against the same defendants, argued at this term, in many respects. The additional facts which are important are, that Marston, the plaintiff, and Swett and others, the defendants, were the assignees of the alleged patent right of Elizabeth Hawks, by virtue of the assignment made by her in 1867, and of the second assignment made by her in 1870, after the surrender and re-issue. Being such owners in common, the defendants agreed with Marston that they should have the exclusive right, and that he should not license others.

In consideration of this, they agreed to pay him fifty cents for

each stove manufactured, containing said invention. It appears that this agreement was not in writing, and the answer (the admissions in which are the only proof of the agreement) qualifies the admission by the averment that the condition of the verbal agreement was, that the plaintiff should execute a written agreement to the same effect, which he has refused to do.

It is not denied that the defendants have made stoves, to a certain number, which would be under the patent, if the patent were valid. The same questions as to the effect of the invalidity of the patent are raised, which were in the other case.

A question was made, whether this verbal contract was valid under the statute of frauds; and a similar question, whether it was valid under the patent laws; the contract being, as was claimed, in effect, an assignment of the patent, and not being in writing.

But without passing upon these, I come to the important point, which is, whether the plaintiff can recover these fees, when the letters patent have been declared void.

Most of what was said in the former opinion is applicable here. Marston was a defendant in the suit brought in the United States court by these defendants, in which the letters patent were declared to be void, and Mrs. Hawks was adjudged not to be the inventor. He had an opportunity there to contest the question of invalidity, and to urge that, as to himself, these defendants were estopped. He might have claimed (with what success it is unnecessary to say), that the decree should be so qualified as to preserve any rights between him and these defendants, arising out of their contract. But that was not done, and the decree must be conclusive.

The plaintiff in this action made some offers tending to show collusion by the defendants with Goodfellow. But so far as these offers were of any weight, they were only an indirect attack on the decree in the United States court. If that alleged collusion was a good defense, it could have been shown in that suit.

It is urged by the plaintiff's counsel that the ownership in common of the alleged patent right, prevents the defendants from averring its invalidity as a defense.

And the case of *Kinsman v. Parkhurst*,* is relied upon. In that case a patentee and an assignee of a part interest entered into

* 18 How. (U. S.), 289.

the joint business of manufacturing the patented machines. The business was to be carried on by the parties on joint account, and a division of the profits was to be made according to a certain ratio. After the business had been carried on for a time, a bill was filed for an accounting. The defense was, the invalidity of the patent. The court held this no defense. The defendant had "made and sold the machines under the complainant's title, *and for his account.*" "The invalidity of the patent does not render the sales of the machines illegal." "Where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received." That does not apply to this case. If Marston had been in partnership with the defendants in the manufacture of these stoves, he might have been entitled to his share in the profits as should have been agreed. But there was no joint ownership of the business. The defendants were only his licensees under a patent which proves to have been void. And this case falls under that of *Saxton v. Dodge*,* and others like it in this State. *Kinsman v. Parkhurst* was not an action for license fees, or for purchase of a patent right. It was for the accounting and settlement of a joint venture. And the only important question was, how much was made by the venture, and not whether it was made with or without a valid patent right. Another case relied on by the plaintiff is that of *Cutler v. Bower*.† It is worth while to examine this case briefly, as it is supposed to be important in both of these actions. The facts are these: In July, 1842, the plaintiff, Cutler, had granted the defendant, Bower, the sole license to make certain patented machines, on payment of a royalty. In October, 1842, the plaintiff, in consideration of a certain sum, sold one-half of the patent to the defendant, the defendant to have the benefit of one-half of the royalty reserved by the previous agreement. The plaintiff sued for this sum, the consideration of the sale. There was a plea, replication and demurrer. The court held: First, that the consideration did not fail by reason of the alleged invalidity of the patent; for the defendant, at all events, was bound, by the agreement of July, to pay the royalty, whether the patent was valid or not, as he would be estopped, in an action on that

* 57 Barb., 84.

† 11 Q. B., 978.

deed, from denying the validity. Second, that the proposed defense would be available only if the covenants (referring to the covenant of warranty in the deed of October) were dependent; that in fact they were independent, and each party might sue for a breach of the respective covenants. Now, the second reason would not be good here, where a counter-claim can be made on a cause of action arising upon the same instrument. * And the first reason is directly overruled in the case of *Saxton v. Dodge*, and in the similar cases mentioned in the opinion in the other action. On a question which seems to be settled in this State, it is not necessary to refer to the decisions of other States sustaining the same view. Such, too, seems to be the doctrine of a late case in England, † in which Lord COTTONHAM says: "From the time of the last payment, if the manufacturer can successfully resist the patent right of the party claiming the rent, he may do so in an action for the rent for the use of the patent for that year. The mere taking the license does not estop the licensee from denying the validity of the patent." And certainly, when it has been decided, that, in an action for the consideration of a sale of a patent right, the invalidity of the right may be shown, it necessarily follows that the same rule must apply in an action for royalties, so called, or license fees. The contrary decision in *Cutler v. Bower* may very possibly have been controlled by the conclusive effect then given to a sealed instrument. I think, therefore, that the court correctly held that the plaintiff had no claim against the defendants.

The only remaining question is on the verdict directed for the defendants on their counter-claim. The answer sets up that the plaintiff was indebted to the defendants for goods, wares and merchandise, sold and delivered, etc., since a certain date, in a certain sum, and asked judgment. The reply denied that the plaintiff was indebted to the defendants for goods, wares and merchandise sold and delivered, etc., since that date, in that sum, but admitted that there was a small sum due to the defendants, for goods, wares and merchandise, sold and delivered, etc., the amount of which the plaintiff does not know. It was claimed by the defendants that this was no denial. In strictness, this seems to be correct. To deny that one is indebted

* Code, § 150, sub. 1. † *Nelson v. Fothergill*, 1 Webster Patent Cases, 290.

in the sum of \$100, without more, is not a denial that one is indebted in the sum of ninety-nine. And a denial of indebtedness, followed by an admission that there is "a small sum due" for the same cause, leaves it very uncertain what the party considers to be a small sum; especially when he avers that he does not know its amount. But in any such case, if the party were surprised or misled, the court would permit an amendment, or grant some relief on the trial. Upon looking at the case however, although something was said about the condition of the pleadings in respect to the counter-claim, it would seem that the plaintiff did not urge this point, or show that he was misled.

The important matter evidently was the plaintiff's claim, and this counter-claim was secondary. On the whole, therefore, there is no reason to disturb the course which the case took on the trial.

The judgment and order appealed from should be affirmed.

Present — LEARNED, P. J., BOARDMAN and POTTER, JJ.

Judgment affirmed.

JACOB OMINGER, APPELLANT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, RESPONDENT.

4 159-
35ap 14
4b 159
67 AD*215
67 AD*218

*Contributory negligence — not looking in both directions — when not negligence —
Provisions of agreement between railroad company and contractor — who bound by.*

Although, as to travelers about to cross a railroad track, it is negligence, as matter of law, not to look in both directions, in order to see whether a train is approaching, such rule cannot be applied to persons employed in performing certain work in and upon the tracks and road-bed.

H. and M. agreed with the defendant to perform certain work for it, the contract providing that the defendant should not be liable for any injury sustained by the contractor, his sub-contractor, workmen or laborers, by reason of the negligence of the defendant, its agents or servants, in operating the railroad. The plaintiff, an employe of H. and M., was injured while working upon the track, and this action was brought by him to recover damages therefor.

Held, that as the plaintiff was not a party to the contract, and was not shown to have had knowledge thereof, he was not bound by the provisions contained therein, and that defendant was liable for the injuries sustained by him.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action at the Circuit.

Holler & McEncroe entered into an agreement with the defendant for the construction of a certain part of its road, the contract containing among others the following provisions:

"No claim of any kind shall accrue against the company from any loss of life or injury to the person, or from injury to any animals or other property used by the contractor, or by any person who, as sub-contractor, workman, laborer, or otherwise, shall perform any work, labor or services, or furnish any materials herein contracted for, which may arise by reason of the operating of said railroad, or by means of its engines, cars or machinery, or by the acts of its agents or servants, whether the same occur by accident, negligence or otherwise. And should any such claim be legally made against the company, by reason of the aforesaid premises, the contractor shall pay and discharge the same, together with all the costs and expenses, and shall indemnify the company against all liability on account thereof."

The plaintiff, an employe of the contractor, having been injured, brought this action to recover damages therefor.

E. W. Paige, for the appellant. Whether plaintiff's negligence contributed to the accident, was a question of fact. (Am. Law Reg. [N. S.], May, 1874; *Westchester and Phil. R. R. v. McElwhe*, 67 Penn., 311, 315; *Davis v. N. Y. C. and H. R. R. R.*, 47 N. Y., 400; *Haekford v. N. Y. C.*, 6 Lans., 381; *Gonzales v. N. Y. and H. R. R.*, 39 How., 407; *B. and O. R. R. v. State*, 36 Md., 366; *Mayo v. B. and M. R. R.*, 104 Mass., 137; *Barton v. N. Y. C. and H. R. R. Co.*, 1 N. Y. S. C. [T. & C.], 297, affirmed in Court of Appeals upon the opinion of this court, April 30th 1874; *Goodfellow v. B. H. and E. R. R.*, 106 Mass., 461; *Ernst v. H. R. R. R.*, 35 N. Y., 9.) The provision in the contract presents no obstacle to the plaintiff's recovery. (*Cole v. Hughes*, 54 N. Y., 444, 448.) Defendant was guilty of negligence. The benefits of the statute requiring signals to be given when approaching a crossing, are not restricted by its terms to travelers, and it would make no difference if they were. (*Directors of N. E. R. Co. v. Wanless*, L. R. [7 H. L.], 12; 6 Q.-B., 481; *Cook v. N. Y. C. R. R.*, 5 Lans., 401.) Besides,

plaintiff had a right to rely on defendant's custom of giving the signals there. (*Barton v. N. Y. C. and H. R. R. R.*, 1 N. Y. S. C. [T. & C.], 297; *Ernst v. H. R. R. R.*, 35 N. Y., 9; S. C., 39 id., 61.) The proof of the omission to give the signals was sufficient to go to the jury. (*McGrath v. N. Y. C. and H. R. R. R.*, 1 N. Y. S. C. [T. & C.], 243; *Renwick v. N. Y. C. R. R.*, 36 N. Y., 132.)

S. W. Jackson, for the respondent. The plaintiff is barred of his right of action by the provisions of the contract between his employers and the defendant. (Chap. 140, Laws of 1850, § 44.) A railroad company is not liable for injuries caused by its own gross negligence, to persons who are at the time trespassing upon its track. (*Nicholson v. Erie R. Co.*, 41 N. Y., 525; *Terry v. N. Y. C. R. R. Co.*, 22 Barb., 574; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; S. C., 4 Com., 349; *Clark v. S. and U. R. R. Co.*, 11 Barb., 112; *Matze v. N. Y. C. and H. R. R. R. Co.*, 1 Hun, 417; *Bush v. Brainard*, 1 Cow., 78.) There is also no liability for such injuries where the person injured is upon the track by the license of the railroad company. (*Nicholson v. Erie R. Co.*, 41 N. Y., 525; *Matze v. N. Y. C. and H. R. R. R. Co.*, 1 Hun, 417; *Hounzell v. Smythe*, 97 Eng. Com. Law, 731; *Southcote v. Stanley*, 1 Hurlst. & Norm., 246; *Bolch v. Smith*, 7 id., 732; *Gautrel v. Egerton*, L. R. [2 C. P.], 370.)

LEARNED, P. J.:

The plaintiff was a workman in the employ of a contractor who had a contract with the defendants to do certain work on their railroad. The place where some of the work was to be done, was at a highway crossing called Phillips'. While the plaintiff was there, engaged in this work, he was struck by an engine, passing on the track, and injured. For the injury he brings this action. At the trial he was nonsuited.

He testifies that he was building a culvert or cow-trap at Phillips' crossing; that that is a place where the highway crosses the railroad track; that while he was measuring a stone, one train went to Albany; that he wanted to go over on the other side; that while he did that another train came along and struck him;

that he stood looking at the stone when the train struck him; that he was measuring it for the place; that the bell was not ringing on the train that struck him; that he was listening for it; that the whistle did not blow; that he was at work on the cow-trap on the west side; that at the time he was struck he was measuring a stone which lay, maybe, two feet from the track; that the whistle did not blow and he did not look.

It appeared that the north track, on which this engine was, could be seen for a mile and a half from the crossing. I do not see how the plaintiff could in any way be called a trespasser. First, he was on a highway crossing; so I understand the evidence, which is not altogether clear; second, he was a workman in the employ of a contractor engaged to do work at that place.

As to the question of the defendant's negligence, the testimony is conflicting. The plaintiff testifies that the bell did not ring; another witness testifies that he did not hear it; while the engineer supposes he rang the bell, and the fireman testifies positively that he did. I do not think that we can say that there was nothing for the jury on this point.

A point more strongly insisted on, however, is the alleged contributory negligence of the plaintiff. Ordinarily, this is a question for the jury.*

As to travelers about to cross a track, it is held negligence, as matter of law, not to look in both directions, in order to see whether, at that time, a train is approaching. But it is hardly possible to apply that rule, in its strictness, to a workman engaged on the track. The traveler looks once, and crosses; the workman remains. If it is the workman's duty, as a matter of law, to look in both directions, he must do this as often as it is possible for a train to come in sight. The length of the track in sight from the crossing, was about a mile and a half. A train might pass over this in, perhaps, five minutes. He ought, therefore, under this rule, to look in this direction as frequently as every five minutes, and in the other direction, probably, as often. Such an obligation would be inconsistent with his proper attention to his work. I do not think, therefore, that the rule which has been applied to

* *Filer v. N. Y. C. Railroad Co.*, 49 N. Y., 47, 50; *Barton v. N. Y. C. and H. R. R. R. Co.*, 1 N. Y. S. C. (T. & C.), 297.

travelers crossing the track, is applicable to workmen whose employment requires them to remain on or about it. Such seems to be the doctrine of *Barton v. N. Y. C. and H. R. R. Co.*, above cited. So, in *Goodfellow v. B., H. and E. R. R.*,* the plaintiff was in the employ of a contractor, at work for defendants. He was holding the guy of a derrick; an engine backed down and injured him. At the trial a verdict was directed for the defendants; but in the higher courts this ruling was reversed. The court said that "there was evidence that he was rightfully where he was, and was not in fault in being engrossed in his work and unaware of the approach of the engine until it was too late to avoid it." It seems to me, therefore, that the question of the plaintiff's negligence in this case, was one of fact, which should have been passed upon by the jury.

It is further urged by the defendants, that they are not liable for the reason that, by the terms of their contract with the contractor, they agreed that they would not be liable. The plaintiff was not a party to this contract. It is not even in evidence that he knew anything of it. I do not think that the defendants can contract with one man for the privilege of doing a wrongful act to another without his consent.

Assuming even that the accident occurred a few feet from the highway, still, the plaintiff was on the defendant's land, not by a mere license. He was there to fulfill a contract; he was not a mere stranger roaming over the property, but he was a person on lawful business — like the workman sent to repair gas fixtures.† This view is confirmed by the decision of the Court of Appeals in *Coughtry v. Globe Woolen Company*.‡

The judgment should be reversed and a new trial granted, costs to abide the event.

Present — LEARNED, P. J., and BOARDMAN, J.

Judgment reversed and new trial ordered, costs to abide the event.

* 106 Mass., 461.

† *Indermaur v. Dames*, L. R. (3 C. P.), 311; see *Smith v. Dock Company*, 3 *id.*, 326.

‡ 56 N. Y., 124.

ISAAC W. THOMPSON, APPELLANT, v. MERRITT W.
CLARK, RESPONDENT.

Judgment in action of ejectment—who not bound by—notice of lis pendens—who affected by—Rent.

The plaintiff herein recovered a judgment against one Nancy Bull, in an action of ejectment brought against her, and by virtue thereof was put into possession of the premises. Subsequently this action was brought to recover the rents and profits of the land which had been occupied by the defendant during the pendency of the ejectment suit, under a lease from a person not claiming under Nancy Bull. *Held* (1), that the former judgment was not evidence of plaintiff's title as against the defendant; (2), that the defendant was not bound by the filing of a notice of *lis pendens* in the ejectment suit, as he did not acquire his title from the defendant therein.

APPEAL from a judgment in favor of the defendant, entered upon an order made at the Circuit, dismissing the complaint herein. In November, 1862, the plaintiff commenced an action of ejectment against one Nancy Bull, to recover the possession of the premises described in the complaint in this action, filed a notice of *lis pendens*, and, in July, 1870, recovered judgment therein. After the commencement of the action, and while it was pending, the defendant in this action leased of one Neher, an administrator of Henry Bull, deceased, the premises in question, and occupied them for two years; and it is for the use and occupation of the premises for those two years that this action was brought.

Isaac W. Thompson, appellant, in person.

Esek Cowen, for the respondent.

LEARNED, P. J. :

The plaintiff had recovered in ejectment against Mrs. Bull, and had been put into possession of the premises. He then sued the defendant, Clark, for rents and profits accruing before the plaintiff recovered. It appeared on the trial, that Clark rented the premises from one Neher, and not from Mrs. Bull. The plaintiff claimed

however, that he was entitled to recover on proof of the judgment against Mrs. Bull, and of the filing of notice of *lis pendens* in the action against her, without other proof of his title. The plaintiff was nonsuited at the Circuit, and now appeals.

It is a well known general rule, that judgments are binding only on parties and privies. Proceedings *in rem* (or, in the language of the civil law, *real* actions) constitute the exception. Probably the ancient writ of right was of that nature. But the action of ejectment, in its origin, decided only possession, not title. It was not strictly a real action. It concluded only the parties.* As it was modified and retained by the Revised Statutes, the judgment was conclusive "upon the party against whom the same is rendered, and against all persons claiming from, through or under such party, by title accruing after the commencement of the action."†

It therefore bound no others than parties or privies.‡ The same idea is more definitely stated in 2 Revised Statutes (marginal paging), 342, section 19. There it is enacted, that, if the defendant alien pending the action, and shall have no property of which the damages for rents and profits can be recovered, the alienee shall be liable for the time he possessed the premises. There the ground of liability is the acquiring title from the defendant. The same provisions are continued under the Code of Procedure.§

The plaintiff, however, insists that by filing a notice of *lis pendens*,|| he has given notice to all the world, and that, therefore, the defendant occupied the land with notice of his claim. But the object of requiring or authorizing the filing of such a notice is not to make the judgment affect persons other than the defendant and those claiming under him. It is only to give notice to those who obtain title under the defendant. The person who is about to take a conveyance or a lease of land, and who examines the records for notices of "*lis pendens*," need look only at the name of his proposed grantor or lessor. In the present case, the notice of *lis pendens* against Mrs. Bull gave Mr. Clark no notice that he could not safely take a lease from Mr. Neher. The plaintiff, however, relies on a remark of NELSON, C. J., in *Leland v. Tousey*,¶ that "the

* *Aslin v. Parkin*, 2 Burr., p. 668.

† 2 R. S. (m. p.), 309, § 29 (28).

‡ See, also, *Cleirac v. Reincker*, 11 Wheat., at 296.

§ Sec. 455.

|| Code, § 132.

¶ 6 Hill, 328.

record of the recovery in the ejectment suit is no evidence of title against them [*i. e.*, third persons], unless it appears that * * * *they entered into possession afterwards.*" If "afterwards" means "after the recovery," the remark is of no avail to the plaintiff. But he claims that it means that the judgment is conclusive evidence of the plaintiff's title against all who entered into the possession of the land after the ejectment suit was commenced. This is not sustained by the authorities cited in that case, and is contrary to settled principles.* I cannot think that the court intended to assert such a doctrine.

The judgment should be affirmed.

Present — LEARNED, P. J., and BOARDMAN, J.

Judgment affirmed.

JOHN R. PUTNAM, EXECUTOR, RESPONDENT, v. LUCINDA W. SCHUYLER, APPELLANT.

Guarantor — may prove fraud in principal as a defense to his liability — rule otherwise as to incompetency of principal to contract.

The defendant guaranteed the payment of notes given to the plaintiff's testator by a person to whom the testator was accustomed to give advice, and over whom he had considerable influence. The defendant offered evidence to show that the notes were obtained by fraud, and that they were without consideration, which evidence was excluded. *Held*, that the evidence should have been received, and that proof that the notes had been obtained by fraud would have been a defense to the guarantor.

A party who assigns a note or bond for value, and guarantees its payment, cannot offer as a defense to its payment proof of its invalidity. The guarantor is also liable in cases in which the debt is justly owing, although from some defect or incapacity the principal is not liable on the instrument of which the payment is guaranteed.

APPEAL from a judgment entered on the decision of the court.

The action was brought to recover upon two promissory notes made by Katherine S. Henriques and guaranteed by the defendant.

Matthew Hale, for the appellant. Where such confidential rela-

* *Ainslie v. Mayor*, 1 Barb., 168.

tions exist, as were offered to be proved in this case to have existed between the plaintiff's testator and Mrs. Henriques, the rule is well established, in this State, as well as in England, that the presumption is against the fairness of the transaction, and the burden of proof to repel the presumption is on the party holding the position of confidence. (*Brock v. Barnes*, 40 Barb., 521; *Evans v. Ellis*, 5 Denio, 640; *Sears v. Shafer*, 2 Seld., 268; *Howell v. Ransom*, 11 Paige, 538; *Savery v. King*, 39 Eng. L. and Eq., 569; *Whelan v. Whelan*, 3 Cow., 572; *Gibson v. Jeyes*, 6 Ves., 278; *Brand v. Brand*, 39 How. Pr., 193.) Although this rule has more frequently been applied to the relation of attorney and client, it is equally applicable where the relation is that of physician and patient. (GRIDLEY, J., in *Sears v. Shafer*, 2 Seld., 272; ROMILLY, M. R., in *Cooke v. Lamont*, 13 Beav., 234; Kerr on Fraud, 192; *Billage v. Southee*, 9 Hare, 534; see, also, *Dent v. Bennett*, 4 Myl. & Cr. [18 Eng. Ch.], 269; *Gibson v. Russell*, 2 Y. & Coll. [21 Eng. Ch.], 104; see, also, the opinion of Lord SUGDEN in *Aherne v. Hogan*, Drury, 311, cited in note to *Gibson v. Russell*, 21 Eng. Ch., 120, 122.) This contract was not, in the strict sense of the word, a guarantee. (*Leonard v. Vredenburg*, 8 Johns., 29, 40.) A guarantee is a promise to answer for the payment of some debt in case of the failure of the person first liable for such payment. (Bouvier's Dict.) Here the note was long past due; the person first liable had failed to pay the debt, and was dead. The contract, if it had any validity, was to pay to Dr. Allen the debt due him from Mrs. Henriques on the notes. To this extent the defendant bound herself and no further, and to this extent and no further the answer admits her liability. (*Thomas v. Williams*, 10 B. & C., 664, 669.) A surety may set up duress of his principal as a defense. (*Osborn v. Robbins*, 36 N. Y., 365, 372; *Strong v. Grannis*, 26 Barb., 122, 127.) And may plead usury. (9 Paige, 197.) It is also settled that forbearance is a valid consideration for a promise to pay the debt of another, only to the extent of the right of the party forbearing. (*Jones v. Ashburnham*, 4 East, 435; *Thomas v. Williams*, 10 B. & C., 664, 669.)

John R. Putnam, respondent, in person. If this action was against the personal representatives of Mrs. Henriques, such a

defense might be available; but it is insisted that the defendant, as guarantor of the notes in suit, and in an action on her special contract of guarantee, has no right to set up such a defense. She cannot show any fraud, illegality, error or mistake in the inception of the notes. (*Mann v. Eckford's Executors*, 15 Wend., 502; *Remsen v. Graves*, 41 N. Y., 475; *Lewis v. McMillen*, 41 Barb., 420, 431, 432; *Gillespie v. Torrance*, 25 N. Y., 306; *Sterns v. Marks*, 35 Barb., 565; *McLaughlin v. McGovern*, 34 id., 208, 211; *Erwin v. Downs*, 15 N. Y., 576.) That the notes in suit were obtained by fraud, was a personal defense to Mrs. Henriques or her personal representatives. (Willard's Eq. Jur., 607; 14 Johns., 407; 2 Cow., 195, 238; 2 Johns. Ch., 252.) The defendant was not a party to the notes; she was a guarantor of their payment, and the action was on the guarantees; and the guarantees were special contracts separate from the notes. (4 Seld., 215; 20 N. Y., 337; 6 Barb., 285; 22 id., 516.) By the contract, defendant, for a valuable consideration, agreed that the notes should be paid. The words "value received" admit a good consideration for the guarantee. (22 Barb., 516; 24 Wend., 35; 23 N. Y., 495; 19 Wend., 557.) Hence, by the terms of the written contract, entered into by the defendant for a valuable consideration, she became liable to pay the notes, and to allow her to show that the notes were invalid in whole or in part, as a defense in an action on her guarantees, would violate the terms of the written contract.

LEARNED, P. J. :

Mrs. Henriques, in her lifetime, made two notes to Dr. Allen, the plaintiff's testator. After her death the defendant guaranteed them, by writing under each, as follows:

"For value received I hereby guarantee the payment of the above note.

"L. W. SCHUYLER."

On the trial the defendant offered to prove that Dr. Allen was the medical attendant of Mrs. Henriques; was in the habit of advising her as to financial and other matters; that she reposed confidence in him in relation to her affairs; together with certain other matters tending to show that the notes were obtained by fraud, and that they were without consideration. The evidence

was objected to on the ground that, by executing the guaranty, the defendant had admitted the notes, and was estopped; that the defense of fraud was personal to Mrs. Henriques and her representatives; that the defendant could not impeach the settlement between maker and payee. The evidence was excluded, and the defendant excepted.

I assume, from the manner in which the case is presented, that it was not really claimed on the trial that these matters would not have been competent in behalf of the representatives of Mrs. Henriques. Their exclusion was on the ground that they were not competent in behalf of the guarantor. On this subject, of the right of a guarantor to set up defenses which would undoubtedly be valid in favor of the principal, there is an apparent conflict. But a little discrimination will show that the conflict is only apparent.

First. There is a class of cases in which the owner of a note or bond has assigned it, with a guaranty. In these, it has been held that the guarantor could not show that the instrument was invalid. It would be unjust to permit him to assign an invalid instrument; to guaranty its payment or collection; to receive the value, and then, when sued on his guaranty, to assert that the original instrument was invalid. He is estopped.* The case of *Mann v. Eckford's Executors*,† is of this character. The Life and Fire Company, of which Eckford was president, assigned to the Western Insurance Company a bond and mortgage. Eckford guarantied the bond and mortgage, and the money paid for it, *expressing the amount*. The defendants, his executors, were not allowed to set up usury in the bond and mortgage, against the plaintiff, the receiver of the Insurance Company.

Second. The guarantor is held liable in those cases in which the debt is justly owing, although, from some defect or incapacity, the principal is not liable in an action. Thus, where the makers of a note were married women, incapable (then), of making a note, the accommodation indorser was still held liable.‡ The guarantor of

* *Remsen v. Graves*, 41 N. Y., 475; *Zabriskie v. C., C. and C. R. R. Co.*, 28 How. (U. S.), 899.

† 15 Wend., 502.

‡ *Erwin v. Downs*, 15 N. Y., 576; see *Kimball v. Newell*, 7 Hill, 116.

a lease is liable, although only one of the two lessees executed the lease. * In that case, Judge BACON speaks of this class of cases, mentioning, among others, the guaranty of goods sold to an infant. So the guarantor of a note purporting to be made by two, where the signature of one is unauthorized, is liable.† In all these cases the debt is justly owing to the plaintiff; and through no fault of his, he is unable to recover against the principal, or one of the principals.

Third. A guarantor cannot set up, by way of set-off, a claim distinct from that on which he is sued. The right of set-off (that is, as distinguished from a defense arising upon the claim itself) belongs only to the principal debtor, and can be used only at his option. Such is the doctrine of *Gillespie v. Torrance*, ‡ and this is all which that case decides on this point. By indirection, however, it implies that a defense to the claim (as distinguished from a set-off), is available to the guarantor. To the same effect is *Lewis v. McMillen*. §

Fourth. But there are still other cases which are not embraced within either of these three preceding classes: cases where the plaintiff is the original party to the contract, and therefore has not received it by assignment from the guarantor; where the proposed defense is not the incompetency of the principal to contract; and where it arises out of the contract itself, and not by way of set-off. In these the guarantor has been permitted to make the defense.

He has thus, as to the original contract, been allowed to set up usury; || duress of his principal; ¶ partial failure of consideration. ** And I find no case which intimates that when a person has obtained an obligation from a principal by fraud, he can wipe out the fraud by obtaining a surety to the obligation. Assuming that, in justice and equity, the obligee, by reason of fraudulent acts on his part, has either no claim, or a less claim, against the principal, I see no reason why he should stand in a better position against the guarantor.

* *McLaughlin v. McGovern*, 34 Barb., 203. † *Sterns v. Marks*, 35 Barb., 565.
‡ 25 N. Y., 306. § 41 Barb., 420.

|| *Morse v. Hovey*, 9 Paige, 197; *Parshall v. Lamoureux*, 37 Barb., 189.

¶ *Osborn v. Robbins*, 36 N. Y., 365; *Strong v. Grannis*, 26 Barb., 122.

** *Sawyer v. Chambers*, 43 Barb., 622.

The distinction which has been pointed out, viz., that inability on the part of the principal to contract is no defense to the guarantor, while fraud in the contract is, may be found in the civil law. This says that personal defenses do not pass to others, but that defenses, *inherent in the thing*, such as, among others, fraud and duress, are available to sureties. * “If, in the principal obligation, there is any essential vice which may annul it, as if it has been contracted by force, if it is contrary to law, or to good manners, *if it be founded only on a fraud*, or on some error which may suffice to annul it; in all these cases the obligation of the surety is likewise annulled.” †

The defendant offered to prove acts of the plaintiff's testator, tending to show that he obtained the notes improperly from the maker; that he took advantage of her confidence in him, and that she did not owe him. If these facts be true, he ought neither to recover of her representatives on the notes, nor of the defendant on her guaranties.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed, and new trial ordered, costs to abide event.

LUCY BEAU, APPELLANT, v. ANTOINE KIAH, RESPONDENT.

4 171
130a 400

Married woman — services of, performed at request of and for others — who entitled to sue for.

The plaintiff, a married woman, living with and keeping house for her husband, took care of her mother and sister, who were sick at the house of defendant, who promised to pay her for her services. *Held*, in an action brought by her to recover for such services, that she was properly nonsuited; as her services belonged to her husband, he alone could maintain the action. (BOARDMAN, J., dissenting.)

* *Dig.*, 44, 1, *de exceptionibus*, c. 7, § 1; *Cod.* 2, 24 (23) *de fidejuss.* 2.

† *Strahan's Domat*, bk. 3, tit. 4, § 5, art. 2; *id.*, bk. 3, tit. 4, § 1, art. 10.

THIS is an appeal by plaintiff from a judgment of nonsuit in a County Court, and from an order of said court denying a motion for a new trial.

The plaintiff is and was a married woman, living with and keeping house for her husband. Defendant is her father. In 1867 and 1868, plaintiff's mother and sisters were sick at defendant's house. Defendant came for plaintiff to get her to go to his house and take care of her mother and sisters, and said he would pay her well. She went and took care of them for six months. After their deaths plaintiff returned home. Plaintiff never carried on any business on her own account. Upon this evidence the plaintiff was nonsuited, upon the ground that her services belonged to her husband, and he only could maintain the action.

J. H. Magone, for the appellant. A married woman may maintain an action to recover for her labor or services under a contract made with her therefor, without showing that she carried on business on her own account beyond that out of which the claim in suit arose. (*Adams v. Curtis, impld., etc.*, 4 Lans., 164.) It is enough that a separate contract is made with her for her labor or services, to entitle her to recover, without the necessity of holding out to the world that she is transacting business on her separate account, as a *feme sole*, with the permission of her husband. The statutes of 1860 and 1862, necessarily include the right on the part of a married woman to make valid bargains for her labor or services before they are performed. (*Adams v. Honness and others*, 62 Barb., 326.) If a married woman can make valid bargains for her services, it follows that she can enforce them. (*Brooks v. Schwerin*, 54 N. Y., 343.)

J. MacNaughton, for the respondent. At common law, the wife's services and earnings belonged to her husband. (Reeve's Dom. Rel. [Parker's ed.], 138, and cases cited; *Filer v. N. Y. C. R. R.*, 40 N. Y., 56; 1 Chit. Pl., 84.) It is the wife's capacity as trader or laborer, on her "sole and separate account," that gives her a property in her earnings. The cases recognize, pointedly, the different capacities in which a married woman may trade and labor, and uniformly assert the "sole and separate" capacity of the wife as the only foundation of her right to contract, and of her right to

her earnings. (*Filer v. N. Y. C. R. R.*, 49 N. Y., 48; *Brooks v. Schwerin*, 54 id., 343; *Kinns v. Kinne* [Fourth Dep., Gen. Term, 1873], 45 How. Pr., 68; *Hanse v. De Witt*, 63 Barb., 53; *Perkins v. Perkins*, 7 Lans., 71; 4 id., 166.) *Adams v. Curtis*, recognizes a "sole and separate capacity as an essential ground of right, although the case stands alone in an attempt to apply no other or wider test of it than the particular labor sought to be recovered for. (*Filer v. N. Y. C. R. R.*, 49 N. Y., 47; 8 S. C. [1 Hun], 542.) The statutes conferring privileges upon married women are in derogation of the common law, and to be strictly construed. (7 Lans., 22; 6 Hill, 382; 5 N. Y., 383; 14 Barb., 531, 532; 4 Sandf., 236.) If their terms admit of two interpretations, that should be adopted which most nearly conforms to the rule of the common law. There is no evidence in the case to show that the plaintiff did the service in her sole and separate ("independent") capacity.

LEARNED, P. J.:

I suppose the husband is still entitled to the services of the wife. This must be so, because on the husband only lies the obligation to support the family. If not entitled to her services, while bound to support her and the children, he cannot require her to aid him, or claim to receive the value of her services, when she works for others. She *may* perform labor and services, as she may carry on business on her separate account. But not all labor performed by her is necessarily separate.* A wife cannot recover for loss of ability to work. If her earnings were her own, then she could recover, although not actually engaged in work. A man recovers for damages by reason of inability to work, when injured. Whether he was actually working or not, is important only as a test of the *value* of his work, not as a ground of recovery. Therefore, if a married woman were entitled to her earnings *in all cases*, the decision in *Filer v. N. Y. C. R. R. Co.* would be wrong. *Brooks v. Schwerin* † seems to be an overruling by the Commission of Appeals of *Filer v. N. Y. C. R. R. Co.*, decided by the Court of Appeals. ‡

Adams v. Curtis § only holds that the earnings in that case

* *Filer v. N. Y. C. R. R. Co.*, 49 N. Y., 47.

† See dissenting opinion of LOTT, Ch. C.

‡ 54 N. Y., 343.

§ 4 Lans., 164.

might be separate, although there had been no other separate work. The contract in that case was between the wife and a firm of which the husband was a partner. That fact made the earnings, or might make them, separate property. In the present case there is no evidence that the husband knew anything about the services. If we reverse the judgment, we must hold unqualifiedly that every time when a married woman does any work for a person, other than her husband, her earnings are separate. If this be so, I do not see why she is not entitled to be paid by her husband when she does work for him — nurses him in sickness, or sews on his buttons in health. If we are to take the statute literally: "The earnings of any married woman from her * * * labor and services shall be her sole and separate property," why not her earnings in the work of the household? The section must be read as a whole. "A married woman may, etc., perform any labor and services on her sole and separate account, and her earnings * * * from [such] her * * * labor and services shall," etc. That is, she *may* carry on business, and she *may* perform labor, on her separate account. But not necessarily all business carried on, or labor performed by her, is on her separate account.

The judgment should be affirmed.

BOARDMAN, J. (dissenting):

By the statutes of 1860, * it is enacted that the property which a married woman acquires by her trade, business, labor or services, carried on or performed, on her sole or separate account * * * shall, notwithstanding her marriage, be and remain her sole and separate property, and may * * * be collected * * * by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts."

By the second section of that act it is provided that "a married woman may * * * perform any labor or services on her sole and separate account; and the earnings of any married woman from her * * * labor or services, shall be her sole and separate property."

Undoubtedly, the object of this and other similar laws was to protect married women from the incompetency, the rascality and

dissipated habits of husbands. It is the duty of the husband to provide for and support the wife; experience, however, has often shown that husbands have failed in this duty, and that the wife has supported the husband and his family. Where he was wasteful, dissipated and reckless, he would often spend all his own earnings and the property and earnings of his wife, and, under the common law she had no protection. Even if living separate from him and supporting herself, his creditors could, for his debts, seize her prudent accumulations and leave her destitute. He was as absolutely entitled to her industry and earnings as though she were his slave. These laws were passed to emancipate the wife. Such has been the view taken by the courts. Now, it is held that the ordinary domestic services of the wife are not carried on for her own account, but for the joint benefit of the family, as a duty to the husband. But, when she goes outside of the family and performs services not due to her husband, such services do not, of right, belong to the husband, and her earnings are her own, as if she were a *feme sole*. *

The reasoning of Lorr, Ch. C., in the dissenting opinion in this case, would lead to most unhappy results. The security of the wife's natural rights would lead to a separation of families. The wife, instead of struggling to preserve the family circle, would be rewarded only upon condition of its abandonment. The case of *Filer v. N. Y. C. R. R. Co.*, † which is cited as an authority for such a doctrine, in fact decides only that the wife could not recover for the loss of ability to labor and earn money, by reason of an injury, because she was not actually engaged in some service in which, but for the injury, she would have earned something for her separate benefit. There was no claim in that case that she had ever done any but household labor and domestic service in the family of her husband. But if the case were doubtful upon principle, it is *res adjudicata* in this court. The very point was decided in *Adams v. Curtis*, ‡ in which MILLER, P. J., says: "Nor is it essential, for the purpose of maintaining an action to recover for her labor and services, to show that she carried on business on her own account, beyond the claim for which an action is brought. It is enough that a separate contract is made with her for her services, to entitle her to recover, without the necessity of

* Brooks v. Schwerin, 54 N. Y., 343, 348. † 49 N. Y., 47. ‡ 4 Lans., 164.

holding out to the world that she is transacting business on her separate account, as a *feme sole*, with the permission of her husband."

This is decisive of the present case. The case of *Adams v. Curtis*, so far as its principles apply to the one under discussion, has been approved in *Perkins v. Perkins*.*

The judgment and order of the County Court must be reversed and a new trial granted, costs to abide the event.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

NORMAN COX, AS EXECUTOR, ETC., OF HENRY PECK, DECEASED,
RESPONDENT, v. THE NEW YORK CENTRAL AND HUD-
SON RIVER RAILROAD COMPANY, APPELLANT.

Stipulation that action should not abate by death of plaintiff — power of counsel to make — Code, section 121 — meaning of verdict in — Exemplary damages — in what cases they may be given.

Where an application was made by defendant's counsel to put a case over a term of the court, and, as a condition of the cause going over, the defendant's counsel stipulated that in case of the death of the plaintiff before final judgment, the cause of action should survive, and not abate by his death; *held*, that an authority in the counsel to make such stipulation could not be inferred from his employment, but must be established as a fact. (JAMES, J., dissenting.)

As to whether the stipulation, if authorized by the defendant, would be valid. *quære*.

After a verdict is set aside, it is as if no verdict had ever been rendered, and a verdict which is afterward set aside will not be sufficient, under the second paragraph of section 121 of the Code, to prevent an action from abating by the death of a party.

The essence of a wrong's justifying exemplary damages is, that it shall be an intentional violation of another's rights, or that a proper act shall be done with an excess of force and violence, or with malicious intent to injure another in his person or property.

* 62 Barb., 531, 540.

APPEAL from a judgment for the plaintiff of \$4,000 damages besides costs, entered upon the verdict of a jury, and from an order denying a motion for a new trial upon the minutes.

The plaintiff's testator, having purchased tickets upon the defendant's road, entered a drawing-room car and took a seat there. Upon being applied to for extra pay for seats in that car, he declined to pay or give up the seats for the reason that there were no vacant seats in the ordinary coaches. Thereupon the conductor forcibly removed him from the cars at Palatine Bridge, returning his passenger tickets. The testator brought this action against the defendant for the wrong and injury done him, and, upon the first trial, recovered a verdict of \$8,000. The damages claimed in the complaint being only \$5,000, the excess was remitted, and judgment entered for \$5,000 damages. On appeal to the Supreme Court, third department, such judgment was set aside and a new trial granted, because the damages were excessive.

On a subsequent application of the defendant to put the cause over a Circuit at which it was noticed by the plaintiff for trial, the counsel for the defendant, as a condition for the cause going over the term, stipulated that in case of the death of the then plaintiff before final judgment, the cause of action should survive, and not abate by his death. Before the case came on for trial, the then plaintiff died, and the present plaintiff was substituted.

Upon the last trial a recovery was had for \$4,000, and a motion for a new trial upon the minutes was denied. From such order, and from the judgment entered upon this verdict, this appeal is taken.

Isaac S. Newton, for the appellant.

Robert A. Stanton, for the respondent.

BOARDMAN, J. :

Three reasons are urged why this judgment should be reversed and a new trial granted, or judgment ordered for the defendant.

First. That the action abated by the death of the testator, Henry Peck, and the cause of action does not survive.

Second. That there is no evidence of malice, as was adjudged

upon the former appeal in this court, or other misconduct on the part of the conductor, which can justify the charge of the court allowing exemplary damages, and that the charge in that respect was erroneous.

Third. That the damages are excessive in any point of view, and vastly exceed the law of compensation to which plaintiff or his testator was entitled.

But for the stipulation, I am satisfied this cause of action would have died with the plaintiff's testator. The final clause of section 121 of the Code takes the place, in my judgment, of section 4, 2 Revised Statutes, 387.* The verdict therein referred to, is the verdict upon which the case shall thereafter proceed. When such verdict is set aside, it is as though no verdict had ever been rendered in the case. The judges of the Court of Appeals have acted upon this belief in at least two cases.† Such a recognition by that court should guide us, notwithstanding the suggestion that it was inconsiderate.

Does the stipulation, if authorized, wipe out the law, and make, by virtue of its own intrinsic power, a new law directly hostile to the old? I think not. It is a stipulation that the court may do what the law says it cannot do. It creates a right in the plaintiff outside of and in hostility to the law. In many cases, rights are given to parties for their benefit, which they may waive. Here, an absolute right is attempted to be created by the parties, the law denying its existence. It is an extreme view to suppose that an attorney or counsel may impose such an obligation upon his client. It is not within the ordinary conduct of a cause. Ordinarily, what relates to the remedy only, may be controlled by the attorney, if within the fair scope of his authority as an attorney, in the progress of litigation. But when he attempts to deprive his client of an abstract right, given by the law, and in no way related to the conduct of the litigation intrusted to him, he acts in excess of any real or implied power intrusted to him. The courts have gone far in some instances to justify counsel in the use or waiver of remedial processes, used for the protection of rights or the prevention of wrongs, but such conduct has been adjudged, in the respective cases, to be within the scope of the apparent, if not real, authority conferred by the client.

* Edmonds' edition, 402.

† Comstock v. Dodge, 48 How., 97, and Spooner v. Keeler, 51 N. Y., 536.

Such a presumption cannot be indulged in this case. The act done was so far from the ordinary conduct of the case, so novel in its character, and so extraordinary in its consequences, that an authority should not be presumed from employment, but must be established as a fact. It follows that this action cannot be maintained as for a tort since the death of Henry Peck.

It is suggested that this action might be sustained, by virtue of the stipulation, as an action for a breach of contract. That may be true. As such an action seeks only compensation for an actual loss sustained, this judgment could not stand; it would be excessive in amount. Besides, the charge of the court in that view is erroneous in the many respects to which exceptions were taken by defendant, and especially in the rule of damages laid down.

Upon the hearing of the former appeal in this case, Mr. Justice DANIELS, delivering the opinion of the court, held, in substance, that there was no evidence in the case that would justify the allowance of exemplary, or vindictive damages, and that as a consequence the former judgment of \$5,000 was entirely beyond what was justified by the circumstances of this case, even if it be one which would justify punitive or exemplary damages.

The case has been retried upon the same evidence, in substance (and in fact, as to Henry Peck and Moody), and the jury have now rendered a verdict of \$4,000. Is not this verdict condemned by the former decision as excessive? The essence of a wrong justifying exemplary damages is, that it shall be an intentional violation of another's rights, or that a proper act shall be done with an excess of force and violence, or with malicious intent to injure another in his person or property. "It can make no difference whether the action be one nominally *ex contractu* or *ex delicto*. * * * In either case, if no evil motive be imputed, the amount of compensation is as much a matter of law as the right itself, and can with no greater safety be submitted to the vague and fluctuating discretion of a jury." * In this case the plaintiff's testator was notified that he must vacate the seat or pay for it. He refused to do either. It was optional with him to leave a train in which he could not procure a seat without extra pay, or to pay for such seat. On his

* Sedge. on Dams., 472, 522, 528, 545, 617; Edwards v. Beebe, 48 Barb., 106; Wallace v. Mayor N. Y., 9 Abb., 40.

refusal to do either, the conductor removed him with such slight force as was necessary. There is no evidence of an intent to do more than was necessary to accomplish that purpose. There is no evidence of malice or of any preconceived intent to injure the deceased. There is little, if any, personal injury to the deceased; the loss of time was of no moment. What is there, then, in the case that calls for a verdict of \$4,000? Little, indeed, besides the mortification and humiliation to which the testator was exposed by being put out. There is nothing in the case to show that defendant did not run sufficient trains to accommodate the public at the ordinary fare. In fact, the testator was so accommodated within two hours after being put off. If it be conceded that some exemplary damages might have been justly allowed, yet they should be in proportion to the aggravation. Here we have seen that the aggravation, if existing at all, was very slight, yet the defendant is punished to nearly the extent of \$4,000 beyond actual compensation for such slight or doubtful aggravation. We are disposed to concur in the views of Mr. Justice DANIELS, and to hold with him that the damages in this case are so excessive as to show prejudice, passion, or an incorrect appreciation of the law applicable to the case.

For the reasons first herein given, the judgment and order appealed from must be reversed. But, since the cause of action did not survive the death of Henry Peck, the trial thereafter was a nullity, and no new trial should be ordered. Following the precedents in 43 Howard, 97, and 51 New York, 536, no costs are allowed.

JAMES, J. :

This was an action by Henry Peck, to recover damages for his forcible removal from one of the cars running on defendant's road. Since the first trial of the cause, the plaintiff, Peck, has died, and the plaintiff, as executor, has been substituted as plaintiff in his stead.

It appeared that the deceased bought three tickets for himself, wife and daughter, from a lateral road, entitling the holders to a passage on defendant's road from Utica to Albany. At Utica, these persons went on board of a train standing on the track, and took seats in a palace car. After the train started, they were called upon for their passage tickets, which were presented, accepted and

taken up by the train conductor. A few minutes after, the drawing-room car conductor called upon them to pay for the seats occupied in said car. This the deceased refused. He was informed of the rules of the cars, and of the duty of the conductor to collect pay or require their removal from that car; and that, unless complied with, he should be compelled to cause their removal therefrom. The train was a special train, running in competition with a Pennsylvania road, without reference to lateral roads in this State, and was made up of all drawing-room cars, except one common car in the rear. On being again required to pay for seats, deceased was notified of the car in the rear, but, as all the seats in that car were occupied, he refused to remove or pay for the seats in the drawing-room car. On arriving at Palatine Bridge, a regular stopping place, about forty miles distant from Utica, the deceased was removed from the car with no more force than necessary to overcome the resistance offered, his wife and daughter following of their own volition, the passage tickets being handed back. Within a short time thereafter, a regular train on the defendant's road came along; the deceased, his wife and daughter got on board, and were carried to their destination on said tickets.

In the charge, the court told the jury, "if they believed that the conductor, *in the performance of his duty*, acted maliciously, recklessly, or violently, or was guilty of misconduct, they had a right to add what is termed exemplary damages," etc. The jury found a verdict for \$4,000.

This action had before been tried, and on that trial plaintiff had a verdict; a new trial was granted, and on such new trial the present verdict was obtained. Before the first trial, the cause being on the Circuit calendar for trial, the defendant sought to have the same go over the term, on account of the absence of a material witness, and on defendant's stipulating that in case of the death of the plaintiff before final judgment, the cause of action alleged should survive, etc.; on these terms the cause was allowed to go over the Circuit. Before the present trial the plaintiff died, the present plaintiff was substituted, and the present verdict obtained.

So long as the defendant furnished a sufficient number of trains, with a sufficient number of proper cars, to accommodate the traveling public on the line and route of its road, it had the right to run

extra or special trains, with palace or drawing-room cars, charging for seats or rooms therein, and to exclude from such cars all persons refusing to pay the extra price for seats therein. But every such train should in some way be so marked, designated or guarded, as that no passenger could get upon it without notice of its special character. In this case it was not so guarded; the deceased and his family were permitted to enter without notice, and, under such circumstances, the defendant was bound to furnish them seats in a common car, or allow them to remain in the palace car, freed from the extra charge, to their destination. Therefore, while the conductor was simply discharging his duty in their removal, and not liable for damages for its performance in a proper manner, the company itself was liable in damages, not for the acts of the conductor, but for not furnishing seats in a proper car according to the provisions of their contract, as implied from their purchased tickets.

It was the duty of the deceased, on being informed of the situation, either to pay the extra charge or leave the car, and look to the corporation for redress; but refusing to do so, he placed the conductor in a position where he had to disobey his orders or remove the deceased from the car. If, in the discharge of that duty, he used no more force than was necessary to overcome the resistance offered, no action could be sustained against him, and, consequently, none against his principal for that act.*

The gravamen of this action, as I have shown, was the forcible ejection of the deceased from the car by the conductor, not for refusing to carry him in another car provided for passengers with similar tickets, or for a refusal to carry him in the drawing-room car, as that was offered if he would pay for seats.

The court assumed, on the trial that, in putting the deceased off, the conductor was in the performance of his duty. It said: "If the jury believed that the conductor, in the performance of his duty, acted maliciously, recklessly or violently, or was guilty of misconduct, they had the right to add exemplary damages," etc. As an abstract proposition, this part of the charge may be unobjectionable, but it was not applicable to this case, and was improper, as implying

* See *Townsend v. N. Y. C. and H. R. R. R. Co.*, 56 N. Y., 295; *Cleghorn v. Same*, id., 44.

that there was evidence from which the jury might find malice, recklessness, violence and misconduct, when in fact there was no such evidence. It was clear that there was no more force used than was actually necessary to overcome the resistance offered, and was not resorted to until after repeated notice, long forbearance, and after traveling a distance of over forty miles. The amount of the verdict shows that this feature of the charge was seized upon by the jury to punish the defendant for an act of its servant in performing his duty — for doing what he had the right to do. But if it were conceded that the conductor was guilty of an excess of force, of malice, recklessness, etc., in the discharge of his duty, and that it was a case proper for exemplary damages, the verdict was out of all proportion to the force used, or the injury inflicted, as appears by the case; and demonstrates that the jury must have been influenced by prejudice, passion, or something outside the case itself.

The next question is: Did the action abate by the death of the plaintiff? No question is made that, by common law, such would be the result of Peck's death. But it is claimed that this rule of the common law has been changed by the Code; if not, that said result in this case has been saved by stipulation. The Code* provides that, "after a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law." This subdivision of said section received a very careful consideration in *Wood v. Phillips*,† although the precise question now presented was not passed upon. But it may be said in this case, as was said in that, there is nothing in the language of section 121 inconsistent with holding that, after a verdict has once been obtained in an action of tort, the action does not abate, although the verdict be set aside, a new trial granted, and the plaintiff afterward die. Such would seem to be an equitable construction and application in cases where the verdict was set aside for excess of damages, as in this case. The Code is much broader in its provisions than the Revised Statutes, and, liberally construed, would reach this case, and place such causes of action, after verdict once obtained, as to liability to abate on the death of a party, on the same basis as a chose in action, and would

*Sec. 121.

† 11 Abb. (N. S.), 1.

be a construction not inconsistent with the progressive tendency of the age, seeking more exact justice. These views would seem, at first blush, inconsistent with the cases of *Comstock v. Dodge*,* and *Spooner v. Kelly*,† but in neither case was the effect of the Code upon the question even alluded to.

The stipulation in the case was, "that in case of Peck's death before final determination and judgment, the alleged cause of action should survive," etc. It is claimed that defendant is not bound by this stipulation, because the counsel had not authority, as such, to so bind his client. It has been repeatedly held that the court, on application to put a cause over the Circuit, has power to impose, as a condition, that the party shall stipulate that the cause shall not abate in case of plaintiff's death.‡ It appears that in this case the stipulation was given as a condition of allowing the cause to go over the term, and whether imposed by the court, or given by the attorney, knowing the power of the court to impose it, makes no difference, having accepted it and availed itself of the benefit, the defendant is estopped from denying the power of its agent to make it.

For the reasons first above stated, the judgment should be set aside and a new trial granted, costs to abide the event.

LEARNED, P. J., concurred in the opinion of BOARDMAN, J.

Judgment and order reversed, without costs.

CASPER CLOW, RESPONDENT, v. JOHN J. VAN LOAN,
APPELLANT.

Chap. 347, Laws of 1855 — penalties for running a toll gate — in whose name action to be brought — Conveyance of corporate property and franchises by company — validity of — Title to land — when brought in question.

In pursuance of chapter 347, Laws of 1855, the eastern branch of the Schoharie Turnpike Company conveyed all its corporate property and franchises to one Nichols, who entered into possession of the road and collected tolls until 1867,

* 48 How. Pr., 97. † 51 N. Y., 536. ‡ Ames v. Webber, 10 Wend., 575.

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when he conveyed all his right, title and interest therein to the plaintiff. *Held* (1), that the act of 1855 was constitutional and valid; (2), that the plaintiff was entitled to maintain an action in his own name, against the defendant for running a toll gate on the said road.

Where, in an action, a deed is put in evidence for a collateral purpose, it does not bring in question the title to land.

APPEAL from a judgment in favor of plaintiff, entered in the Greene County Court.

The action was brought in a Justice's Court, to recover penalties for running a toll gate on a turnpike. The plaintiff claimed the right to bring suit through a conveyance by the turnpike company of its corporate property and franchises. The answer was a general denial; payment; that the action was not properly brought in the name of plaintiff; that defendant was exempt from paying toll; that plaintiff was not entitled to maintain the action, and that no cause of action existed. A judgment was rendered in favor of the plaintiff for \$34.35, and was affirmed upon appeal to the County Court.

James B. Olney, for the appellant.

John Sanderson, for the respondent.

BOARDMAN, J. :

The act of 1855 * was valid and constitutional; the legislature had the power to create the turnpike company. By the same power it could authorize such company to sell or transfer its corporate rights and franchises. The various acts of the legislature in evidence, show the existence of a legal company. Under the act of 1855, such company, by a deed, good upon its face, conveyed to Nichols the turnpike and all the company's rights, franchises, etc., under its charter. This was in 1855. From that time until 1867, Nichols remained in the possession and use of said turnpike, collecting tolls thereon. I can see no rational principle upon which a doubt can be raised, either as to the power of the legislature to authorize such a sale to an individual, or the right of an individual to take and enjoy under such a sale. If it be conceded that the deed was informal, or that the requisite number of stock-

* Chap. 847.

holders did not consent, it will not benefit the defendant. A sale was made, possession was given, and Nichols used and enjoyed the property sold, under a color of title, claiming to own, for over ten years. The defendant is not in a position to attack such an ownership, or do violence to such a possession and user. If anybody could do so, it would be the stockholders of the company; but their laches and neglect would estop them.

If Nichols acquired any title to the turnpike property and franchises, he could convey them to the plaintiff just as the individual owner of a ferry franchise can sell it to another. Rights of this character may be obtained by prescription, and become property in the owners. * Whatever property a man possesses, he may sell and convey, unless by his tenure it is forbidden. †

It results from these considerations, if just, that Nichols acquired the right from the turnpike company, to demand, sue for, and receive tolls, and that he had a right to sell and convey to plaintiff such turnpike, and all the rights, privileges and franchises incident to its ownership. When the company parted with the property, it had no longer any right to receive tolls or bring actions therefor. Such actions must be brought in the name of the real party in interest. ‡ Nor is it of the slightest consequence in this case, whether the turnpike company has been dissolved or still exists. It is sufficient if it appears to have divested itself of all interest in this action. So far as a forfeiture is urged, it is sufficient to say that the franchise must be forfeited by judicial proceedings, before an individual can avail himself of its misuser or omissions. §

It is further urged by the appellant, that the justice erred in not dismissing this action, because the title to land came in question. This claim is not sustained by the evidence. Plaintiff produced his deed, under which he claimed possession, and to connect himself with the charter whereby the right to tolls is given. The defendant did not dispute plaintiff's title by proof. When a deed is put in evidence for a collateral purpose, it does not bring in question the title to land.

* *Wiswall v. Wandell*, 3 Barb. Ch., 315.

† *Adams v. Beach*, 6 Hill, 271.

‡ Code, § 111.

§ *Thompson v. N. Y. and Har. R. R. Co.*, 3 Sandf. Ch., 625; *Adams v. Beach*, 6 Hill, 271.

All that the plaintiff was required to do was to establish his possession of the turnpike, and the right derived from the company to collect tolls. The controversy was not over title to lands, for it stands conceded that this turnpike had been occupied and used for such purpose for more than twenty years, and that for all that time tolls had been collected upon it. No one pretends it was not a turnpike upon which tolls were and had long been collected. But it is denied that plaintiff has shown himself in a position to sue for and collect penalties for non-payment of tolls. Showing himself in possession of the turnpike, is presumptive evidence of ownership for the purposes of this action. The deed or transfer of the company's rights is then given in evidence to show, not a title to the highway, but a right to pursue such remedies as by statute were given to the company for interference with his possession and presumptive title.

If the foregoing reasoning is correct, the judgment of the Greene County Court should be affirmed, with costs.

JAMES, J. :

I fully concur. The title to *land* did not come in question.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

THE PEOPLE EX REL. CHAUNCEY KILMER AND OTHERS *v.*
PATRICK McDONALD, A. J. CHERRITREE AND OTHERS.

Certiorari — when not allowed — Power of legislature to open streets — Const., art. 10, § 2 — chap. 623 of 1870; chaps. 293, 500, of 1872.

The writ of *certiorari* should not be granted upon the application of two or three out of a large number of persons, interested in like manner in assessments for local improvements, especially where adequate relief is afforded in proceedings at law.

The legislature has power to locate and open a highway without the instrumentality of highway commissioners, and to provide for the apportionment and collection of the expenses thereof.

Chapter 623 of 1870, as amended by chapter 293 of 1872, laying out Union

avenue in the village of Saratoga Springs, and providing for the opening and working of the same, and for defraying the costs thereof, is constitutional and valid.

By the said act, the costs and expenses of the improvement are to be assessed against the individual owners, and not against their land.

REARGUMENT upon a *certiorari* to the commissioners for appraisal of damages, etc., upon opening and laying out Union avenue, in Saratoga Springs, and to the town clerk, for the purpose of reviewing such proceedings.

This case has already been decided by this court, the decision being reported in 9 Supreme Court Reports (2 Hun), page 70. Subsequently a reargument was ordered. (Id., 601.)

A. Pond, for the relators.

P. H. Cowen and *L. B. Pike*, for the defendants.

BOARDMAN, J.:

The relators claim that the proceedings by which they have been assessed for supposed benefits to their several pieces of property, arising from the opening of Union avenue, in the village of Saratoga Springs, are void, and should be reversed and set aside for the following reasons:

First. The original act of 1870 * is unconstitutional, in that it appoints persons to discharge the duties of commissioners of highways for said village, in violation of section 2, article 10, of the Constitution of this State.

Second. That the acts of the defendants, commissioners of appraisal under the law of 1870, in making their assessments, are not in conformity thereto, and are consequently void; and hence the taxes imposed upon the relators are illegal, and should be set aside.

Third. That the acts of 1870, and the acts amendatory thereof, are void for vagueness and inconsistency.

Fourth. That the act of 1874 is ineffectual to render valid the prior void acts of the legislature.

Fifth. That these proceedings for review were begun before the passage of the act of 1874, and are therefore not to be affected by it.

* Laws of 1870, p. 1442.

And, first, it is proper to say, that if these propositions are true, if the legislative acts were unconstitutional and invalid, or if the commissioners have not followed the authority given them by these acts, so as to impose legal and valid taxes or assessments, the relators had abundant protection at law, without resort to the writ of *certiorari*. The allowance of the writ on behalf of two or three out of a large number of persons interested, in like manner, in assessments and taxes for local improvements or the public benefit, should be discountenanced, especially where adequate relief is afforded in proceedings at law. *

First. Is the law of 1870 unconstitutional? The commissioners of highways of any town have the right to open highways in the manner prescribed by law. The legislature has the same right, but in a far more unrestricted form. The legislature is the fountain of all power, subject only to the Constitution. The legislature may, therefore, by its own inherent power, locate a highway and provide for paying the damages and opening and working it, without the instrumentality of highway commissioners. † It may also provide for the apportionment of the expenses, and for the manner of collection. ‡ This I understand has been done, as to Union avenue in the village of Saratoga Springs, by the acts of 1870 and 1872. By section 2, Laws of 1870, page 1442, it is enacted that Union avenue shall be 100 feet wide. By the act of 1872, § Union avenue is located, its width is established at 100 feet, the manner of widening to that extent fixed and prescribed, and how compensation shall be made and benefits assessed. The district within which real estate may be assessed for benefits, is defined by metes and bounds. So far then as Union avenue is provided for by said acts, I think it cannot be justly claimed that they are unconstitutional. The legislature has described and laid out the street, and ordered it opened, and provided ways and means therefor. Even if those acts could have been done by the commissioners of highways of the village, they could equally have been

* Matter of Mt. Morris Square, 2 Hill, 16; 25 Wend., 693; Case of Fifty-first Street, 3 Abb. Pr., 232; Matter of Eightieth Street, 17 id., 324.

† Const., art. 1, §§ 7, 11; Clark v. Miller, 54 N. Y., 528; People ex rel. McLean v. Flagg, 46 id., 401.

‡ Litchfield v. Vernon, 41 N. Y., 123.

§ Page 1166.

done by the sovereign power of the State, as may be seen by the cases cited above. But it is not to be conceded that the commissioners of highways could have laid out this street, of the width, and in the manner provided by the legislature. In all these respects it was in excess of their power under the statutes. It is not necessary to consider whether all the powers given to the special commissioners by these acts over the streets of Saratoga Springs, were unconstitutional. It is sufficient if they have acted within constitutional and legal limits in the matters before us for review. There is nothing in the act or purpose indicating an attempt to evade a constitutional right. It was a case where the usual authorities could not accomplish the purpose. In these respects the case is distinguished from *People ex rel. Bolton v. Albertson*.*

For the reasons stated, I think the acts of 1870 and 1872, laying out Union avenue, and providing for the opening and working of it, and for defraying the costs thereof, were good and valid laws, and did not infringe upon section 2 of article 10 of the Constitution.

Second. A much more formidable difficulty arises from the manner in which the authority conferred upon the commissioners of appraisal was exercised by them. The difficulty exists in some degree by the obscurity of the return as to the conduct of the commissioners. Undoubtedly the statute must be substantially complied with, or the tax will be invalid.†

What is a substantial compliance, depends upon the construction to be given to the acts of 1870 and 1872. When this case was last before this court,‡ Mr. Justice MILLER thought that the report of the commissioners of appraisal was fatally defective, by reason of the omission of descriptions of the particular parcels of land assessed. But as the return is made, and upon the papers presented, I am inclined to doubt his conclusion. By the thirteenth section, of act of 1870, the commissioners are to make their report, stating the quantity of land taken for such avenue and its value, with the names of the persons and the amount of damages awarded, and also a general description of all lands and property assessed for benefits, with the names of the owners, and the amount assessed against each. It must be recollected that the first report is lost, as appears by the

* 55 N. Y., 50. † Westfall v. Preston, 49 N. Y., 349. ‡ 4 N. Y. S. C., 290.

return. The commissioners, however, say that such first report showed a strict compliance with the law. By the second or final report, such assessments appear to be in accordance with the act, if the maps returned with the papers constituted a part thereof. Whether they or either of them were part of said second report is not clear from the return, though I think it should be assumed that both were. They are the result of surveys made for this specific object, and were used for the purpose of appraisal and equalization. Assuming that to be true, the report, containing schedules A and B, with the two maps, contains a remarkably full and explicit description of the property taken for the avenue; its value; the awards to each owner for compensation; the names of the owners; also, not only a "general" but a particular "description" of each lot of land or property assessed for benefits, with the names of the owners and the amounts assessed against each on account of such property. Upon such assumption there was a complete compliance with the law in the assessment and second report. I think this conclusion would be equally justified if either map accompanied the report. But if no map was filed with the reports, corresponding with those presented to the court, the assessment and report did not comply with the law. I have said that the maps will be presumed to have been integral parts of the proceedings and reports, because otherwise they have no business here, and should have been stricken out of the return. The return to a common-law *certiorari* should bring up the record of proceedings of the inferior tribunal, and nothing more. It should affirmatively appear therefrom that such proceedings are void. If it is left doubtful or uncertain whether the tribunal has acquired and retained jurisdiction, and pursued it properly, and any fair construction will sustain the action, it will be sustained.

Third. It is urged by the relators that the commissioners of appraisal have assessed the amounts against the individuals instead of the lands, and that such error is fatal. If my previous conclusion be correct, there is no difficulty in sustaining an assessment against the land owners instead of the land. By the act of 1870,* the commissioners are to ascertain "the names of the owners, and the amount assessed against each." Section 16 provides that the

* Page 1446, § 18.

town clerk shall transmit to the board of supervisors "the names of all persons assessed for benefits under this act, and the amount assessed to *each*. * * * The board of supervisors shall also cause the names of all persons returned by the town clerk of said town as assessed for benefits, with the amount assessed against *each*, to be inserted in the assessment roll of said town; the amount so assessed to be levied and collected as other town taxes, and paid," etc.

By the act of 1872, * section 1 of the original act is amended, but the remainder of the act of 1870 remains the same, and is applicable to such amended first section. In the section, as amended, it is provided that compensation shall be made for land taken, and such compensation and the resulting benefit shall be ascertained and assessed in the manner provided in said act, etc. These provisions leave no doubt in my mind that the legislature intended the tax should be personal. It follows necessarily from the fact that it is to be levied and collected as other town taxes. It becomes a tax against the person on account or by reason of the property owned by such person.

In the view I have taken, it is unnecessary to examine whether such a tax could have been ascertained and assessed against these relators legally, without the aid and existence of these maps as a necessary part of the proceedings and report.

These considerations lead to an affirmance of the proceedings and assessments, without reference to the act of 1874, by which the proceedings of the commissioners of construction and the commissioners of appraisal are legalized. Such act is an implied expression of legislative opinion that some of those acts needed legalizing, and that they were, in fact, invalid by reason of some defect of jurisdiction, or insufficiency in the exercise thereof. In my deference to the wisdom of the legislature, I began the investigation of this case in that belief. A careful and somewhat laborious examination has led me to a different result, and I now think such proceedings can fairly be sustained upon the merits, without a resort to the act of 1874. I should, however, do injustice to my own feelings if I did not deprecate and condemn this kind of special legislation for local purposes. It is to be hoped that such legislative interference with municipal corporations may henceforth

cease. Laws of this character are usually urged by no public influence or interest, nor enacted by any proper intelligence or knowledge of the legislature of the wants of the community to be affected.

The proceedings and assessments brought before us by this writ should be affirmed, with costs against the relators personally.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Ordered accordingly.

JAMES WEIR, RESPONDENT, v. GERTRUDE GROAT,
APPELLANT.

Married woman — contract by — intention to charge the same upon her separate estate.

Where a contract made by a married woman is not for the benefit of her separate estate, she is not liable thereon unless the intention to charge the same be expressed in the contract.

APPEAL from a judgment for the plaintiff, entered on the report of a referee.

This judgment was obtained for the value of groceries and provisions, sold by the plaintiff to the defendant. She is a married woman, having a separate estate, and living with her husband and children, for whom the husband ordinarily provides. The husband had been buying on credit of plaintiff, until the plaintiff would not trust him any longer. He then saw the defendant at her house, and the following contract was made between them: "She said, would I give her a book; she wanted to trade on a book; I told her, yes, I would give her a book if she would be responsible; she said she would be responsible; I told her I would not trust her husband, and she said she would not ask me to trust him, but that everything that was got she would be responsible for." At the same time she said she owned "that property," meaning the house and lot where they lived. After the debt was made she promised to pay it. This is the only evidence of an intent to charge her separate estate with the payment of this debt. On this evidence the referee found as a fact, that she agreed to pay for the same out of her separate estate. From the judgment against her she appeals.

R. A. Parmenter and *Geo. Day*, for the appellant. The plaintiff must show affirmatively that the debt was contracted by the defendant either for the purpose of carrying on a separate trade or business, or for her own exclusive benefit upon the credit of her separate estate, or that the intention to charge her separate estate was expressed in the contract itself, or that the consideration was one going to the direct benefit of her separate estate. (*Yale v. Dederer*, 22 N. Y., 460; *White, Exrx., v. McNett*, 33 id., 371; *Corn Exchange v. Babcock*, 42 id., 613; *Ballin v. Dillaye*, 37 id., 35; *Hallock v. De Munn*, 2 N. Y. S. C., 350; *Deck v. Johnson*, 2 Keyes, 348; *Smith v. Allen*, 1 Lans., 101; *Schmidt v. Costa*, 3 Abb. [N. S.], 188; *Coakley v. Chamberlin, Ex., etc.*, 8 id., 37, 44; *Demott v. McMullen*, id., 337; *Valentine v. Lloyd*, 4 id., 371.)

Irving Browne and *Albert Smith*, for the respondent, cited *Mazon v. Scott* (55 N. Y., 247); *Yale v. Dederer* (22 id., 456, 460); *Corn Ex. Ins. Co. v. Babcock* (42 id., 644); *Kelty v. Long* (4 N. Y. S. C., 163); *Owen v. Cowley* (42 Barb., 105); *Jacques v. M. E. Church* (17 Johns., 581); *Buckley v. Wells* (33 N. Y., 518); *Demott v. McMullen* (8 Abb. [N. S.], 335); *Robinson v. Rivers* (9 id., 144); *Valentine v. Loyds* (4 id., 371); *Ledlie v. Vrooman* (41 Barb., 109); *Gardner v. Gardner* (7 Paige, 112); *Quassaic Nat. Bank v. Waddell* (8 S. C., 125).

BOARDMAN, J. :

The case of *Baken v. Harder*, decided at this term,* presents the same legal question, upon the same state of facts, and is decisive. It cannot be claimed that this debt benefited her separate estate, and thereby became a charge. It was the husband's duty to support the family, and he was the person benefited by the property bought. In order to charge her estate, therefore, she must express such intention in her contract. This she has not done.

The respondent labors under the false idea, that such intention may be inferred from her simple promise to pay. That would destroy the only distinction now remaining between the contracts of a married and unmarried female. No case goes to that extent.

* See — p.

In *Maxon v. Scott*, * the court says: "The charge may be made by an oral contract made upon a good consideration *expressing such an intention*, equally as though the contract was reduced to writing." It must be expressed. In *Kelty v. Long*, † and *Owen v. Canoley*, ‡ the property was bought for the benefit of the separate estate, and for that reason the wife was held liable. The wife may, if she pleases, charge her property with any debt, but it is only when it benefits her estate that the intent to charge it thereon becomes unnecessary. In all other cases such intent to charge must be a part of the contract.

The authorities to sustain these principles are too familiar to need citation. The referee therefore erred in finding from the evidence in the case, an agreement to bind and charge her separate estate, made by the defendant in connection with this debt. For this reason the judgment should be reversed, and a new trial be granted, costs to abide the event.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed and new trial granted, costs to abide event.

IN THE MATTER OF THE CLAIM OF JOHN WELLER, RESPONDENT,
v. MARION WELLER AND ANOTHER, EXECUTRIX AND EXECUTOR,
ETC., APPELLANTS.

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Executor — claim of, against estate — 2 R. S., 88, § 33 — reference — bill of particulars — refusal to order, not reviewable — Declarations of deceased — when inadmissible.

Where a claim made by one executor against the estate of his testator, has been rejected by his co-executors, and the same has, upon a stipulation and agreement approved by the surrogate, been referred to a referee to hear and determine, and a judgment in favor of the claimant has been entered upon his report, it is too late to raise the objection that the claim of an executor is not referable (§ 33, 2 R. S., 88), but must be heard by the surrogate in person.

Upon the trial the referee refused to require the plaintiff to furnish a bill of par-

* 55 N. Y., 251. † 4 N. Y. S. C., 163; S. C., 1 Hun, 714. ‡ 42 Barb., 105.

ticulars. *Held* (1), that this was a matter of discretion, and, in the absence of an abuse of such discretion, it was not reviewable; (2), that defendants, when the claim was presented, could have required it to be made more precise and particular before accepting or rejecting it.

In an action against executors to recover a debt due from their testator, his declarations are not admissible to show that he was not indebted to the plaintiff.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

John Sanders, for the appellants.

James Fuller, for the respondent.

BOARDMAN, J. :

The plaintiff was an executor named in the will of Jacob Weller, deceased. Defendants were also executrix and executor of said will. Plaintiff presented a claim against the estate of deceased, which was rejected by the defendants, and, upon a stipulation and agreement, approved by the surrogate, the claim was referred to a referee to hear and determine the same. The referee found in favor of plaintiff's claim, and on motion judgment was ordered for the plaintiff upon the report of the referee, but without prejudice to defendants' right to review the exceptions.

The defendants object that a claim of an executor, named in the will, against the estate, is not referable under section 33, 2 Revised Statutes 88, but must be heard by the surrogate in person. That may be true, but these parties have agreed to have this dispute heard by a referee, and the surrogate has approved of such agreement. It is now too late to object. The objection could properly have been raised by defendants when the reference was had. Having failed to make the objection then, it is waived.

The defendants urge further, that the referee erred at the trial, in not requiring plaintiff to furnish a bill of particulars. There are two sufficient answers to this exception: First, it was a matter in the discretion of the court, and, in the absence of an abuse of discretion, is not reviewable; * secondly, it was in the power of the defendants, when plaintiff's claim was presented, to require that it should be made more precise and particular, before accepting or

* *Cadwell v. Goodenough*, 28 How., 479.

rejecting the claim. Besides, the application for such bill should be made to a court, or a judge at chambers, and not to the referee, no demand having been made under section 158 of the Code.*

For a third exception, the defendants claim that the report of the referee is against the clear weight of evidence. I do not think so. The report is abundantly sustained by the evidence of William Weller and George Weller, sons of the deceased, as to his admissions to them shortly before his death. Against this is the evidence of Judge Sanders, of declarations of the deceased at the time of making his will, to the effect that he did not owe anyone. If we should concede that this evidence was admissible, there would be the evidence of two witnesses for the plaintiff, against one for the defendants, as to the declarations of the deceased. As a court of review, we could not, upon such a state of facts, say the referee should have believed the one witness, however worthy, and discredit the two. But the declarations of the deceased were not admissible in favor of his estate, to show that he was not indebted to plaintiff. The declarations of a party against his interest are admissible upon the presumption that he would not speak to his own injury unless it were true. But he cannot make evidence by declarations in his own interest. The defendants represent the deceased, and they can prove no declarations of his which he could not.

The case is not one where a new trial can be granted upon the ground that the report of the referee is against the clear preponderance of the evidence.

There can be no propriety in claiming that the legacy given plaintiff by the will of deceased was to be a satisfaction of plaintiff's claim. There is not the slightest evidence of any such intention.†

The opinion of the referee is quite satisfactory upon the last two subjects discussed.

For the reasons stated, the judgment must be affirmed, with costs.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

*2 Wait Pr., 348.

†Williams v. Crary, 4 Wend., 443; Rickets v. Livingston, 2 Johns. Cas., 97; Clarke v. Bogardus, 12 Wend., 67; Fort v. Gooding, 9 Barb., 371.

MARY•KATE SULLIVAN, AN INFANT, ETC., RESPONDENT, v.
MARY SULLIVAN AND OTHERS, APPELLANTS.

Action for partition—Remainderman may bring it—Tenancy in common—for purposes of partition, may exist between remainderman and owner of present estate.

The plaintiff's testator, in his lifetime a tenant in common with the defendant Thomas Sullivan, devised his share of the real property held in common, to his widow for life, with remainder to plaintiff in fee. *Held*, that the plaintiff could bring an action for partition during the life of the widow.

A remainderman may have a constructive possession which will be sufficient to constitute the unity of the right of possession required to exist in a tenancy in common.

THIS is an appeal from a judgment ordered at Special Term of this court, upon the report of a referee.

The action was brought by plaintiff to compel a partition or sale of certain premises, situated in the city of Troy; and judgment was rendered for a sale of the premises and division of the proceeds. The defendant Thomas Sullivan took exceptions to the report of the referee, and brought this appeal from the judgment.

The material facts, as found by the referee, are, that John Sullivan, plaintiff's testator, in his lifetime, owned in fee, and was possessed of, the one equal undivided half part of the premises described in the complaint, as tenant in common with the defendant Thomas Sullivan; that he devised the same to his wife, defendant Mary Sullivan, for life, with remainder to plaintiff, in fee. John Sullivan, at the time of his death, and Thomas Sullivan, with their families, were residing upon the premises, and the plaintiff with her mother, and Thomas with his family, continue to reside upon them.

Martin I. Townsend, for the respondent.

Ezek Cowen, for the appellants.

POTTER, J.:

But one question is discussed upon the points in behalf of the appellant, and that is, whether the plaintiff can maintain an action of partition upon the facts in this case. The objection that the

plaintiff cannot maintain such action, was distinctly taken by the answer, and is determined by the judgment. This question, from the examination I have been able to give to it, does not seem to have been decided by the court of last resort in this State, nor have the decisions of this court upon the question been entirely uniform.

This question is very ably discussed, and the cases claimed to have a bearing upon it are reviewed and criticized, in *Blakeley v. Calder*,* by Judge DENIO. The conclusion reached by him is, that all those cases were decided upon questions other than the one involved in the case of *Blakeley v. Calder*, except the case of *Brownell v. Brownell*;† and the decision in the latter case is not a correct exposition of the law upon this question, if it was really involved in the latter case.

This court had held in the case of *Blakeley v. Calder*,‡ that a remainderman, though not in actual possession of premises, might maintain an action for their partition. This case was taken to the Court of Appeals, and Judge BOWEN, in that court, delivered an opinion affirming the judgment of this court, at General Term — that the purchaser at partition sale of the premises be compelled to complete the purchase, upon another ground than the right of the remainderman to maintain the action. Judge DENIO also wrote the opinion in the case above referred to, in favor of affirmance, upon the ground that the owner of a vested remainder, though not in actual possession, could maintain an action for partition; and the opinion of Judge DENIO was concurred in by three other (and perhaps not the least able) judges of that court. The next reported case, involving this question, is *Howell v. Mills*.§ That case distinctly held that a remainderman, not in the actual possession, could maintain the action.

I do not think the court, in the case under consideration, would be warranted in disregarding the current of decision upon this question, even if its members entertained views not altogether in harmony with the cases cited.

The decisions upon the subject since *Brownell v. Brownell*,| concur, that an actual or present possession is not necessary to maintain the action, but that the language of the statute,¶ “when

* 15 N. Y., 617.

§ 7 Lana., 193.

† 19 Wend., 367.

| *Supra*.

‡ 13 How. Pr., 476.

¶ 2 R. S., 317.

several persons shall hold and be in possession," is satisfied, though the remainderman be not in the actual possession. It may be remarked that the legislature took this view, in enacting section 448 of the Code, and in making the provisions of the Revised Statutes applicable to the action of partition; for the language of that section is: "When lands, etc., are held or possessed by joint tenants or tenants in common."

But, it is insisted in this case that, however it may be held as to the right of one of several remaindermen, who are not in the actual possession, to maintain the action of partition, a sole remainderman cannot maintain the action. In other words, that the plaintiff must be a joint tenant or tenant in common, in order to maintain partition; the plaintiff in this case, having no tenant in common, cannot maintain the action. It is argued that the plaintiff is not a tenant in common because there is no unity of possession between her and any other owner. This argument is based upon the necessity of an actual possession. But is actual possession necessary to constitute a tenancy in common? We have seen that *actual* possession is not required under a statute giving the right to this action to persons in possession. Constructive possession answers the requirement of that statute. May not constructive possession equally well answer the requirement of the definition of a tenancy in common? A tenant in common, as defined in Washburn's Real Property,* "is where two or more persons hold possession of lands and tenements, at the same time, by several and distinct titles." The quantities of their estate may be different, the shares may be unequal; the modes of acquisition of title may be unlike; and the only unity between them be that of possession. "There may be a tenancy in common among several owners of a remainder,"† yet neither of the remaindermen is in actual possession.

Possession of premises so as to allow the bringing of an action of partition, is presumed from the allegation in the complaint, that the parties are seized as tenants in common.‡ The seizin of one tenant in common who admits, or does not deny, the title of his

* Page 562.

† 1 Wash., 563; Coleman v. Lane, 26 Geo., 515.

‡ Jenkins v. Von Schaack, 3 Paige, 242; Burhans v. Burhans, 2 Barb. Ch., 898.

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cotenant, may be considered as the seizin of all the tenants.* Where there is no visible adverse possession, the entry of one cotenant is deemed a possession and seizin of all, according to their titles.† Possession of one tenant in common is the possession of all.‡ Hence, I conclude that constructive possession is sufficient to constitute the unity of the right of possession required in a tenancy in common.§ It is also urged that a power in a remainderman, having no right of actual possession till a remote future, to compel a partition or sale of lands in the actual occupation of other owners who prefer and whose interest it is to continue that occupation during the period that they are entitled to the actual occupation, may be inopportune or oppressively exercised.

These are the conditions and incidents which appertain to this species of ownership of real estate, and cannot become legitimate subjects for the consideration of the court in the present stage of this case.

The judgment should be affirmed, costs of the parties to this appeal to be paid out of proceeds of sale, as provided in the judgment.

Present — LEARNED, P. J., BOARDMAN and POTTER, JJ.

LEARNED, P. J., dissented.

Judgment affirmed, costs to be paid out of proceeds of sale.

JOHN L. WEISMER, RESPONDENT, v. THE VILLAGE OF DOUGLAS, APPELLANT.

ROBERT HALSEY v. THE SAME.

Chapter 577, Laws of 1868 — town bonds — cannot be issued to aid corporation created for private purpose — payment of interest on — estoppel.

In pursuance of chapter 577, of the Laws of 1868, bonds were issued by the village of Douglas in payment of stock of the Long Eddy Hydraulic and Manufacturing Company, a private corporation created for the purpose of

*Shumway v. Holbrook, 1 Pick., 114.

† Thomas v. Hatch, 3 Sum., 170.

‡ Bryan v. Ashester, 5 Day, 191.

§ Putnam v. Ritchie, 6 Paige, 398.

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improving a water privilege and of manufacturing lumber in the said village. In an action brought upon said bonds, *held*, that the purpose for which the company was created was a private one, and that the legislature could not authorize the village to issue bonds in aid thereof.

After the bonds were issued, the interest due thereon was paid once, and the village once voted on its stock. *Held*, that the village was not thereby estopped from setting up the invalidity of the bonds in this action.

APPEAL from a judgment in favor of the plaintiffs, entered upon the trial of these actions by the court, without a jury.

These are actions to recover the amount due on certain coupons attached to bonds issued by the defendant. They were tried at Special Term, without a jury, and a decision was given for the plaintiff in each. The defendant appeals. The same questions arise in each action.

The Long Eddy Hydraulic and Manufacturing Company was a corporation formed under the general laws of this State for the purpose of "constructing and improving a water privilege * * * and for the purpose of manufacturing lumber." In other words, it was a saw-mill company. By chapter 837, Laws of 1867, the company was authorized to build a dam across the Delaware. By chapter 577, Laws of 1868, the village of Douglas was authorized to take stock, not to exceed \$10,000, in this company. This was to be done by the usual system of commissioners and consents, which has been so notorious for the few last years.

Three commissioners were to be appointed for the purpose of taking the stock. They were to issue scrip; this scrip was to be denominated on its face, "Internal Improvement Fund of the Village of Douglas." No bonds were to be issued until the written consent had been obtained of a majority of tax-payers representing a majority of the taxable property. No subscription was to be made to the stock until at least \$15,000 of the stock had been in good faith subscribed, and forty per cent thereon paid in. The bonds were to be negotiated at not less than par; the proceeds to be invested in securities, and the securities collected to meet the assessments on the stock of the company owned by the village. Taxes to pay the principal and interest due on the bonds were to be collected in the same manner as other village taxes.

On the 1st of June, 1868, and at the time of the issue of the

bonds, Dennis D. McKoon was president, Henry H. McKoon was treasurer, and Francis G. Barnes was clerk, of the village of Douglas. A meeting of the village trustees was held on that day, at which were present Dennis D. McKoon, U. S. Tyler, C. G. Armstrong and — Peak. McKoon was then treasurer, and Peak and Tyler stockholders, in the Long Eddy Hydraulic and Manufacturing Company. On that day these trustees of the village appointed Dennis D. McKoon and Samuel Miller and George Potts, two other stockholders of the Long Eddy Hydraulic and Manufacturing Company, "commissioners for internal improvement fund." Prior to this time, however, and to the issue of the bonds as heretofore stated, \$15,000 of the stock of the company had not been in good faith subscribed for; nor had forty per cent thereon been paid in. But the stockholders had had a meeting in the spring, and Potts had agreed to assume \$300, Parmenter \$500, and McKoon \$1,000; so as to have it appear that all of the stock was taken. Potts' extra stock was paid for in work; Miller gave a note for the first fifteen per cent; and McKoon declined to pay his, on account of the understanding that he was not to pay. Peak paid for his stock by building a boarding-house for the company. Under the provisions of the act, consents to issue said bonds were obtained, proved and acknowledged, and certified by the village clerk. These represent a majority of the taxable property, provided the signature of the president of the New York and Erie Railway Company is a sufficient signing to represent the company, without a resolution of the board of directors. There is no evidence that it was authorized by any resolution of the board.

Said Dennis D. McKoon, as president, said Henry H. McKoon, as treasurer, Francis G. Barnes, as clerk, and said Dennis D. McKoon, Samuel Miller and George Potts, as commissioners, signed bonds to the amount of \$10,000, denominated on the face, "Internal Improvement Fund of the Village of Douglas." These bonds recite a statute passed April thirtieth. The statute was in fact passed May fifth. They are payable to Dennis D. McKoon, treasurer, or bearer. They were delivered to Dennis D. McKoon.

On the 1st of July, 1868, a certificate of stock in the Long Eddy Hydraulic and Manufacturing Company for 100 shares, signed by Dennis D. McKoon, treasurer, and Cyrus Peak, president, was

issued to the village. It states that fifteen per cent had been paid. A second installment, of same date, of twenty-five per cent; a third of thirty-five per cent, August twenty-seventh; and a fourth of twenty-five per cent, October first, are indorsed; all signed by Dennis D. McKoon, treasurer.

The bonds of the village were not sold, but were turned over to the company for the stock. The plaintiffs, in December, 1868, or January, 1869, and in a month or two after that, bought some of these bonds. They got them of Dennis D. McKoon, and paid him for them. The plaintiffs now sue on the unpaid coupons of these bonds.

The trustees of the village of Douglas, since the issue of this stock, have voted thereon. And the taxable inhabitants of the village have once voted to raise, by special tax, the interest, \$525, to become due on the bonds; and the same was raised and paid accordingly.

H. & W. J. Welsh, for the appellants. The bonds, being issued without the consents required by statute, are void in the hands of *bona fide* holders or purchasers for value. (*Starin v. The Town of Genoa*, 23 N. Y., 449, 450; *Gould v. Town of Sterling*, id., 462, 465; *The People v. Mead*, 36 id., 224; *Town of Venice v. Breed*, 1 N. Y. S. C., 130.) The act of the legislature, passed May 5, 1868, was and is unconstitutional, null and void. The liability was created without providing any judicial forum, in which the legality of the proceeding may be questioned by the parties interested. (*Wynehamer v. The People*, 13 N. Y., 395; *Taylor v. Porter*, 4 Hill, 140; 5 N. Y., 511; 12 id., 209; 35 id., 302; referred to and commented on in *The Town of Rochester v. Deyo*, 2 N. Y. S. C., 148.) The act of the legislature above referred to, and under which those bonds are alleged to have been issued, is void, for the reason that it authorized the taking of private property for a private purpose. (Gerard's Titles to Real Estate, 736; *The People v. The Mayor of Brooklyn*, 4 N. Y., 422; *The People v. Holbert*, 46 id., 113; *Beekman v. Sar. and Schen. R. R. Co.*, 3 Paige, 45; *Varick v. Smith and the Attorney-General*, 5 id., 137; *Bloodgood v. Mohawk and Hud. Riv. R. R. Co.*, 18 Wend., 9; *People v. Norris*, 13 id., 328; 2 Kent's Com. [10th ed.], 227; *Taylor*

v. *Porter*, 4 Hill, 143; *In the Matter of Albany Street*, 11 Wend., 149, 151; *Embury v. Conner*, 3 N. Y., 511; Sedg. on Stat. and Const. Law, 177; *The People v. Flagg*, 46 N. Y., 405; *Gordon v. Cornes*, 47 id., 612; Cooley on Const. Lim., 494; *People v. Batchellor*, 53 N. Y., 143; *Sweet v. Hulbert*, 51 Barb., 312.)

Youmans & Niles, for the respondents. Delegation of the authority to the village of Douglas to issue bonds, and provide for their payment by tax on its inhabitants, was an exertion of the power of taxation on the part of the legislature, as distinguished from the right of eminent domain. (*Duanesburgh v. Jenkins*, in Com. Appeals, 1873, not reported, MS. opinion by JOHNSON, C.; *People v. Mayor, etc.*, 4 Comst., 419; *Guilford v. Supervisors of Chenango County*, 3 Kern., 143; *Olcott v. Supervisors*, 16 Wall., 678.) The constitutional inhibitions against depriving a person of property without due process of law, and taking private property for private purposes, have repeatedly been held not to apply to the case of property or money exacted by the power of taxation. (*People v. Mayor, etc.*, and *Guilford v. Supervisors, etc.*, above cited; *Darlington v. Mayor, etc.*, 31 N. Y., at pp. 189, 190; *Davidson v. Mayor, etc.*, 27 How., 342; *People v. Mitchell*, 45 Barb., 308; S. C., affirmed, 35 N. Y., 551; *Bank of Rome v. Village of Rome*, 18 id., 38; *Thomas v. Leland*, 24 Wend., 65; 2 Dillon's Munic. Corp., 686, and cases.) The right of eminent domain can only be exercised for a public use, in the strict sense of the term, and then only to an extent necessary for the purposes of that use (*Taylor v. Porter*, 4 Hill, 140; *Matter of Albany Street*, 11 Wend., 148; *Embury v. Conner*, 3 Comst., 511; *Guilford v. Supervisors, supra*; 2 Dillon's Munic. Corp., 556 *et seq.*); while the taxing power may be exerted whenever public interests may be thereby promoted, without reference to a user by the public. (*Darlington v. Mayor, etc.*, 31 N. Y., 164; *Brewster v. Syracuse*, 19 id., 118; *Bank of Rome v. Village of Rome*, 18 id., 43; *Clark v. Rochester*, 24 Barb., 489; *Olcott v. Supervisors*, 16 Wall., 678; and cases before cited.) The powers of the legislature within its sphere of action are absolute and supreme, subject only to the restrictions contained in the federal and State Constitutions, and it is the sole and exclusive judge of the expediency or necessity of exercising those

powers. (COWEN, J., in *People v. Morrell*, 21 Wend., 576; *Butler v. Palmer*, 1 Hill, 330; *Leggett v. Hunter*, 19 N. Y., 463; *Clark v. Rochester*, 24 Barb., 446.) The taxing power and right of eminent domain, being among those inherent to the legislature, are unlimited, while exercised within their legitimate spheres. (*People v. Lawrence*, 41 N. Y., 141, and numerous cases cited; *Howell v. Buffalo*, 37 N. Y., 270; *Matter of Peter Townsend* and other cases, *supra*; *Clark v. Rochester*, 24 Barb., 446; *Bloomfield, etc., Natural Gas-light Company v. Richardson*, 63 id., 437; *Talbot v. Hudson*, 24 L. R., 228; *Hasbrouck v. Milwaukee*, 13 Wis., 37; *Brodhead v. Milwaukee*, 19 id., 37; *Olcott v. Supervisors, etc.*, 16 Wall., 678; *Bloodgood v. Mohawk, etc., R. R. Co.*, 18 Wend., 9; S. C., 14 id., 57; *Buffalo, etc., R. R. Co. v. Brainard*, 5 Seld., 109; *People v. Vearring*, 27 N. Y., 306; *Duanesburgh v. Jenkins, supra*; MILLER, J., *In re Townsend*, 39 N. Y., 181.) The following results would have flown from an accomplishment of the objects of the company. As to the public use: 1. The improvement of the navigation of the river by cleaning out the channel and construction of docking and piers for the benefit of the public. 2. The creation of a slack water for the convenience and security of raftsmen. 3. The introduction of pure and wholesome water into the village for public and domestic purposes. This is clearly a public use. (*Wayland v. County Commissioners*, 4 Gray, 500, per THOMAS, J.; *Gardner v. Newburgh*, 2 Johns. Ch., 162; *Mayor, etc., v. Bailey*, 4 Denio, 443, 446; 2 Dillon's Munic. Corp., 561.) 4. The improvement of the mill site. The question as to whether the improvement of a mill site is a public use, has never been expressly adjudicated in this State, so far as the reported cases show, but the subject has received judicial discussion in other States with Constitutions similar to our own, where this question has been uniformly answered in the affirmative. This is the case in Massachusetts. (*Boston, etc., Corp. v. Newman*, 12 Pick., 467; *Hazen v. Essex County*, 12 Cush., 478; *Commonwealth v. Essex County*, 13 Gray, 249.) In Connecticut. (*Olmstead v. Camp*, 33 Conn., 532; *Bradley v. N. Y. and N. H. R. R. Co.*, 21 id., 305; *Nicholson v. N. Y. and N. H. R. R. Co.*, 22 id., 86.) In Wisconsin. (*Newcomb v. Smith*, 1 Chand., 71; *Pratt v. Brown*, 3 Wis., 603; *Fisher v. Horicon, etc., Co.*, 10 id., 351.) In Virginia. (See *Orenshaw v. Slate River Co.*, 6 Rand., 245.)

In Tennessee. (*Harding v. Goodlett*, 3 Yerger, 41.) And doubtless many others. Our own courts, in referring to this particular object, evidently regard it as of the same nature as others of a public character. (See remarks of SMITH, J., in *Clark v. Rochester*, 24 Barb., 482, in respect to the erection and operation of a flouring mill; *Bloomfield, etc., Gas Company v. Richardson*, 63 id., 449.) By proceeding under the act in question, and seeking and accepting the benefits thereby conferred, the defendant has waived the right to question its constitutionality. (*Houston v. Wheeler*, memorandum, 52 N. Y., 641, MS. opinion by FOLGER, J.; *Sherman v. McKeon*, 38 id., 266; *Embury v. Conner*, 3 Comst., 511; *Baker v. Braman*, 6 Hill, 47; *Vose v. Cockcroft*, 44 N. Y., 415; *Vanhook v. Whitlock*, 26 Wend., 43; *The People ex rel. N. Y. and H. R. R. Co. v. Havemeyer*, 4 N. Y. S. C. [T. & C.], 365.) Where a corporation issues and puts into circulation obligations purporting on their face to have been issued within the scope of its corporate powers, it is precluded as against a *bona fide* holder from asserting their invalidity, although they were in fact issued for a purpose not authorized by law. (*F. and M. Bank v. B. and D. Bank*, 16 N. Y., 125; *Stoney v. American Life Insurance Company*, 11 Paige, 635; *Supervisors v. Schenck*, 5 Wall., 784; *Morford v. Farmers' Bank*, 26 Barb., 568; *State of Indiana v. Woram*, 6 Hill, 33; *Moss v. The Rossie Lead Mining Co.*, 5 id., 137.) To this class of cases the defense of *ultra vires* does not apply. (5 Am. Law Rev., 272; 2 Dillon's Munic. Corp., 855.) That any fraud or irregularity in the issue of the bonds does not constitute a defense against a *bona fide* holder for value, is too well settled to admit of question. (*Bank of Rome v. Village of Rome*, 18 N. Y., 38; *Grand Chute v. Winsgar*, 15 Wall., 355; *Lexington v. Butler*, 14 id., 282; *Mercer Co. v. Hackett*, 1 id., 83; *Gelpecke v. Dubuque*, id., 175; *Myers v. Muscatine*, id., 384.)

LEARNED, P. J. :

The act incorporating the village of Douglas,* authorizes it to sue and to be sued. Probably, this relieves the cases from the question whether an action is the proper remedy for the plaintiffs. † Without passing on that question, we come to the merits.

* Laws of 1867, chap. 449.

† *Brady v. Supervisors*, 10 N. Y., 260; *Martin v. Supervisors*, 29 id., 645; *Bell v. Esopus*, 49 Barb., 506.

It should be noticed, in the outset, that the forming of a corporation does not make the purpose of the corporation a public one. Therefore, the purposes of the Long Eddy Hydraulic and Manufacturing Company are no more public than those of a single individual would be, if he were engaged in the same business. We are to treat this case just as if it were not a corporation, but a few partners who were to engage in the business of improving a water privilege and manufacturing lumber, and the village of Douglas was to be one of the partners.

What then was the business of the company? The certificate distinctly states that it is the constructing and improving a water privilege, and the manufacturing of lumber, etc., thereon. Some facts are found by the court below, in this connection, which should be noticed. It was found that the construction of the dam would have caused slack water, which would be of advantage to lumbermen, by enabling them to construct piers; that lumber, logs and timber are the principal products of the surrounding country; that the material growth and prosperity of the village would have been increased by the accomplishment of the objects of the company; that the public might have been benefited by the clearing out of the channel of the river; that by the use of proper appliances the water could have been conducted through the village from the dam.

So far as I can see, there is no evidence on these points in the case. Presumptively, it would seem that the forcing of water by some proper appliances, up ten feet into the village, would not aid the water privilege, or the manufacture of lumber. But, at any rate, these purposes are problematical, and are not connected with the objects of the company. When a company shall be formed for the purpose of docking the river, of clearing its channel, or of conveying water into the village, it will be time to decide whether such purposes are of a public character. We have now to do only with a company incorporated to improve a water privilege, and to manufacture lumber, etc.; useful purposes, but are they *public*?

In some States, the legislature may authorize the taking of land for mill sites *in invitum*. Statutes giving such power, and called flowage acts, are recognized as valid in Massachusetts, Connecticut, and in some other States. They have not been so recognized in

this State that I am aware of; and the expression of opinion on the subject has been unfavorable. *

The taking of land, *in invitum*, has been principally done by railroads, etc. Its ground is necessity, and that is its limit. †

But the question here is not on the right of taking land *in invitum*, although it may have some analogy with that subject. ‡ And the numerous cases showing that, on making compensation, land may be taken for railroads, water-works, and the like, have not much to do with this case. The question here is, whether a municipal corporation can tax the persons and property under its government, in order to turn over the money so raised, to individuals, for the purpose of building a saw-mill.

Another point which should be noticed is, that this question is not affected by the fact (assuming it to be a fact) that a majority of the tax-payers consented. In private corporations, within the scope of the corporate powers, the majority properly govern. But the village is not organized for manufacturing purposes. The majority have no necessary right, therefore, to compel the minority to enter into speculations of this kind. A village is a subordinate branch of the civil government. The legislature may give the management of its municipal affairs to the majority, or to such other authority as may be constitutionally designated. What right has any village authority, whether supported by the majority of tax-payers or not, to take by tax the private property of their citizens in order to give it to others? The mere fact that parties live within the same corporate limits, does not authorize the majority to make bargains for the minority in matters not pertaining to the corporate body. § While, again, if such a power can be derived from an act of the legislature, then it would follow that no consent of a majority of tax-payers would be needed, in case the legislature chose to dispense with it.

The legislature, without the consent of the majority of the tax-payers, could authorize the municipal authorities to levy taxes for

* *Hay v. Cohoes Company*, 8 Barb., 42; *Cooley's Const. Lim.*, 584.

† *N. Y. and C. R. R. Co. v. Gunnison*, 8 S. C. (1 Hun), 496; *R. and S. R. R. Co. v. Davis*, 43 N. Y., 187.

‡ *People v. Mayor of Brooklyn*, 4 N. Y., 419.

§ *Taylor v. Porter*, 4 Hill, 148.

such purposes as these, if they could give such authority with the consent of such majority. Courts have already seen the evil of such a doctrine; and they have held that a corporation cannot be compelled to embark in private business — not even in a railroad.*

Without regard, therefore, to the fact that few of the tax-payers, or many, consented to the issue of these bonds, we return to the question whether the legislature has any power to authorize a municipal corporation to raise by tax money for the purpose of paying it to private individuals to use in their manufacturing enterprises. The right to tax is necessarily involved in the right to issue bonds, because it is by taxation only that the bonds must be paid. There is no other resource for payment.

It is too late now to dispute that acts similar to the present are constitutional when the enterprise is the construction of a railroad. This is upon the ground that the railroad is a public highway.† As it is the duty of a municipality to take care of the roads and highways within its limits, it was held that “a railroad terminating at a village or city was not so foreign to its public interests” that the municipality might not subscribe to its stock. And from that position the doctrine has finally gone to the extent of allowing a county to give aid to a railroad out of the State.‡

But even as to railroads, it seems to be thought that the doctrine has been carried too far; for, while a railroad constructed by a private corporation is a public highway,§ and while the legislature may compel a town, without the consent of its citizens, to issue bonds for the construction of highways,|| yet, with happy inconsistency, the courts of this State have recently held that the legislature cannot compel a town to issue bonds to aid in the construction of a railroad by a company.¶ In the language of that decision, a railroad is “a work, public in some respects, but private in others.” Now, decisions which have sustained the so-called “bonding statutes,” have always recognized the fact that *railroad companies* are private corporations. But they have sus-

* *People v. Batchellor*, 53 N. Y., 128.

† *Olcott v. Supervisors*, 16 Wall., 678, at 696; *Clarke v. Rochester*, 24 Barb., 446; *Bank of Rome v. Village of Rome*, 18 N. Y., 38.

‡ *Railroad Company v. Otoe*, 16 Wall., 667.

§ *Bank of Rome v. Village of Rome*, *ut supra*.

|| *People v. Flagg*, 46 N. Y., 401.

¶ *People v. Batchellor*, 53 N. Y., 128.

tained these statutes on the ground that the *purposes* or *objects* of the companies were *public* improvements; "that the railroad had not lost this character because constructed by individual enterprise."

Since, therefore, the case last cited holds that the *railroad* — that is, the thing constructed — is "a work public in some respects, but private in others," we may safely understand that this case shows at least a modification of former decisions. So, too, in the case of *Loan Association v. Topeka*,* it is remarked "that few courts have decided in favor of these so-called 'bonding statutes,' without a division among the judges, and others have decided against them altogether." And the court adds: "Of the disastrous consequences which have followed its recognition [the constitutionality of such statutes] by the courts, and which were predicted when it was first established, there can be no doubt." The tone of that decision indicates a doubt of the soundness of the principle which has been decided — even as to railroads.

But when we get beyond the influence of those powerful corporations, and inquire whether a legislature can authorize a city or town to levy a tax for the support of a manufacturing establishment, there can be no doubt, on principle, or from the decisions. No tax can be levied by a city, which is not for a public purpose. And the probable benefit which may come to a city or village from a successful manufacture, is not a public purpose. If a tax may be levied by a city to aid a manufacturer, it would follow that a tax might be laid to aid a merchant; or, in other words, a city, under the form of taxation, might take away the property of some of its citizens to enrich others. This would be confiscation rather than legislation. It is contrary to sound constitutional law — unless, perhaps, in the case of a protective tariff.

A State cannot order a city to raise money by taxation, to establish one of its citizens in business.† The legislature cannot, in the form of a tax, take the money of a citizen and give it to an individual.‡ A municipal bond, issued under legislative authority to secure the location, or aid in the erection of a manufacture, is void, in the hands of a *bona fide* holder. §

* 20 Wall, 655.

† Cooley's Const. Lima., 494.

‡ Brodhead v. City of Milwaukee, 19 Wis., 658

§ Commercial Bank v. Iola, 2 Dillon, 358.

The legislature of Maine authorized the town of Jay to loan its credit to persons who were about to put up a steam saw-mill. There was to be a run of stones for grist, so that it might have been urged that one object was the grinding of grain, and that this was a public purpose. The town voted to loan \$10,000 on this consideration. On the suit of some of the inhabitants, it was held that this was not a public purpose, and that the legislature could grant no such power. *

So, even where, under the authority of the legislature, a town voted to exempt manufacturing establishments from taxation for ten years, it was held that this was indirectly taxing others to give money to the manufacturers, and that it could not be done.†

The legislature of Massachusetts passed a law, authorizing the city of Boston to raise money by the issue of bonds, for the purpose of lending it to owners whose buildings had been destroyed by the great fire. In the case of *Lowell v. City of Boston*, this law was declared to be unconstitutional. It authorized taxation merely for the benefit of private individuals. Yet in that instance it might have been said with great force, in the language of the decision in the present case, "the material growth and prosperity of the village (city) would have been largely increased by the accomplishment of the objects of the company (owners), as it would have added a large tax-paying element thereto, and increased the value of the adjacent property."

This question has been carefully examined in the case of *Loan Association v. Topeka*.‡ The city of Topeka had been authorized by the legislature to issue bonds to aid a bridge manufacturing and iron-works company. The only defense considered was, whether such a statute was constitutional. No question was made as to the regularity of the issue, and the plaintiff was a purchaser for value. The city had raised by taxation, and paid the coupons first due. This action was on other coupons. The court held that the bonds were void; that a statute which authorized a town to issue bonds in aid of the manufacturing enterprise of indi-

* *Allen v. Inhabitants of Jay*, 60 Maine, 124.

† *Brewer Brick Company v. Brewer*, 13 Am. Law Reg. (N. S.), 735; see, also, the same principle in *Weeks v. Milwaukee*, 10 Wis., 242.

‡ 20 Wall., 655.

viduals, is void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the gain of others, and not for a public use. That case, decided by a court which has manifested no reluctance to sustain the rights of holders of municipal bonds, seems to be sound and decisive.

Some remarks of the court are applicable also on the point which is urged upon us: That the village of Douglas has once paid interest on these bonds, and has voted on the stock. "Such a payment works no estoppel." The legislature had no authority to authorize the village to take this stock, or to issue these bonds. All the acts were void, and nothing which has been done can authorize a future levy of taxes for this purpose.

Such is the course of decisions on this question. Others still might be cited. They show that the holding of bonds issued by municipalities to aid railroad companies to be valid was an exception to the general rule; an exception unfortunate, if not unsound. That it rested on the ground that the work was public; and that later decisions hold that such work is public only "in some respects." And they further show that, with this exception, courts have refused to sustain laws which authorize municipalities to tax their citizens for the benefit of private enterprise.

The judgment should be reversed, and judgment ordered for defendant in each case.

Present—LEARNED, P. J., BOARDMAN and JAMES, JJ.

Ordered accordingly.

JANET A. LATHROP, APPELLANT, v. HELEN DUNLOP
AND OTHERS, RESPONDENTS.

*Will—revocation of, by marriage—2 R. S., 64, § 39—Construction of words
"deemed to be revoked."*

A, while a resident of this State, made her will. Subsequently, in Canada, she entered into an ante-nuptial agreement, by the terms of which she retained full control of her own property. Afterward she married and died. *Held*, that by the provisions of 2 Revised Statutes, 64, section 39, the will was revoked. The expression of the statute "deemed to be revoked" is positive, and does not create a mere presumption in favor of revocation, subject to be explained.

APPEAL from the decision of the surrogate of Albany county, refusing to admit to probate the will of Jessie Dunlop Empson.

S. O. Shepard, for the appellant. 2 Revised Statutes (5th ed.), section 39, page 145, says: "A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage" (not revoked, but deemed or regarded as revoked, unless circumstances indicate to the contrary). This statute merely raises a presumption of revocation, from the fact of the subsequent marriage. (*McMahon v. Allen*, 4 E. D. Smith, 552, opinion of WOODEUFF, J.) But it is insisted that this section 39 of the statute, if not in express terms, is repealed by implication, by the acts of 1848, 1849 and 1860. Before the passage of these acts (married woman's acts, so-called), it was held that "slight circumstances in some cases were sufficient to destroy the presumption of a revocation arising out of a change in the testator's family." (*Havens v. Vandenburg*, 1 Denio, 32; Dayton on Surrogates [2d ed.], 131.) The words "dispose of," used in an ante-nuptial contract, cover a devise or bequest by will. (*Am. Home Miss. Soc. v. Wadhams*, 10 Barb., 548.) The act authorizing a married woman to dispose of her property (Laws of 1849, chap. 375) also expressly declares "that all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place."

Amasa J. Parker, for the respondent. "A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." (2 R. S., 64 [5th ed.], 145; 2 Edm. ed., 64; § 66, p. 66, chap. 360 of act of 1837.) Before the Revised Statutes, the law was well settled that such subsequent marriage was a revocation; and the only case in which it has ever been claimed to be otherwise, was when the wife survived the husband, which, it was claimed, revived the revoked will. It was clearly the intention of the Revised Statutes to render fixed and certain what, before their adoption, had been open to question, and this clearly appears from the revisers' notes. (3 R. S. [2d ed.], 631.) It will be observed that the exception to the revocation stricken out by the legislature was the one which the revisers think had been recognized in 2 Coke, 6, 2 Term, 684, but which was denied by other reliable

authority and had been overruled. (See 1 Redfield on Wills [3d ed.], §§ 24, 292; 1 Jarman on Wills [Eng. ed.], 114; *Cotter v. Sager*, 2 P. Wms., 623, 624; *Doe v. Staple*, 2 T. R., 685, 696.) It is a singular fact that on this subject of making the statute express the whole law, the State of Massachusetts should differ both from this State and from England. (2 Wash. on Real Property, 697 [marg.]; Mass. Gen. Stat., chap. 22, § 11.) This provision of our statute, by which the will of an unmarried female is revoked by her marriage, admits of no exception and of no presumption that can defeat it. (4 Kent Com., 527, 528 [marg. paging]; *Langdon v. Astor's Ears.*, 16 N. Y., 38; *Adams v. Winne*, 7 Paige, 99; *Delafield v. Parish*, 25 N. Y., 9, 99.)

LEARNED, P. J.:

Jessie A. Dunlop, a resident of this State, duly executed her will. Subsequently, in Canada, she entered into an ante-nuptial agreement, by the terms of which she retained full control of her own property. A few days afterward she married, and about two months after her marriage she died. Her marriage and death occurred in the year 1874; and she was a resident of this State until after her will was executed. Her will was presented for probate, and probate was refused on the ground of her subsequent marriage. From the refusal an appeal is taken.

The question involved is understood to have been decided by this court. As the case is not reported, we state, briefly, our views.

The statute is plain and peremptory. Such a will "shall be deemed revoked." * The appellants urge that, as the expression is not "revoked," but "deemed to be revoked," it should be construed to mean only a presumptive revocation, open to explanation. We think not. The language is accurate. *Revocation* is an act done by the *party*, by which he recalls his will. The statute, therefore, with propriety says, not that the marriage revokes, but that it is to be deemed, or considered the same as, a revocation. It is not a revocation, but it has the effect of a revocation. The statute does not say that marriage shall be deemed a presumptive revocation, but, positively, it shall be deemed a revocation. The language is positive.

* 2 R. S., 64, § 39.

And it is well to have a definite rule on such a point, and not to leave the matter open to the *guesses* of courts, whether, in each particular case, the person intended, or did not intend, to leave her will in force.

The reason of the law is plain, that marriage produces such new relationships that a will made before marriage will not, as a general rule, express the wishes of the woman after her marriage.

We see nothing in the so-called married woman's acts which should modify this statute. The fact that a married woman now has power to make a will, does not affect the reason of the law, which is mentioned above. To illustrate this, the previous sections of the statute declare that, in certain cases, the marriage of a man and birth of children, shall be deemed a revocation of his will. This is not because he had not the testamentary power, but because, as a general rule, the change of circumstances prevents his will, made previously, from expressing his wishes.

The same may be said as to the ante-nuptial agreement. In substance, this gave to the deceased the same rights which married women have now under the laws of this State. It gave her, or purported to give, the power to dispose of her property after marriage. But she did not exercise that power. And it is further important to notice that, even if, as the appellant claims, marriage were only a presumptive revocation, there was no act of the deceased, after such revocation, tending to rebut the presumption.

As the marriage, according to the appellant's views, is to be presumed to be a revocation, and as that is the last act of the deceased affecting this subject, there is nothing to overthrow the presumption.

The decree should be affirmed, with costs against the appellant.

Present—LEARNED, P. J., BOARDMAN and JAMES, JJ.

Ordered accordingly.

WILLIAM TOWNSEND, RESPONDENT, v. NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, APPELLANT.

Passenger—liability of company for wrongful act of conductor in collecting tickets.

The plaintiff, having purchased a ticket from Sing Sing to Rhinebeck, entered a train from New York at Sing Sing, which stopped at Poughkeepsie, where passengers going farther north were accustomed to take the next train. Just before coming to Poughkeepsie, the conductor of the train took up plaintiff's ticket. Plaintiff having entered the next train going north at Poughkeepsie, the conductor of that train, shortly after leaving that place, demanded his ticket, and, upon his refusal to pay the fare, ejected him from the train, although informed by the plaintiff and other passengers that the other conductor had taken his ticket. In an action brought by the plaintiff to recover damages for such expulsion, *held*, that he was entitled to recover.

4h	217
70 AD	408
d 71 AD	204

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

The plaintiff purchased a railroad ticket at Sing Sing for Rhinebeck. With this ticket in his possession, he went on a train from New York at Sing Sing. This train went no farther than Poughkeepsie. It was customary for passengers who were going farther north, to take another train at Poughkeepsie. After the train on which the plaintiff was had passed Peekskill, the conductor called for tickets, and took up and retained the ticket of the plaintiff.

Upon the arrival of the train at Poughkeepsie, as the train went no farther, the plaintiff got out and waited for some twenty-five minutes until another train came along, which was going north. He got into this train. The conductor of this train asked him for his ticket. The plaintiff told the conductor that he had purchased a ticket at Sing Sing for Rhinebeck, and that the other conductor had taken it up. Some of the passengers told the conductor that the plaintiff had such a ticket. The conductor told the plaintiff that he must pay the fare. The plaintiff refused to do so, and was, for this reason, put off the car at Staatsburgh. No unnecessary

force was used. The plaintiff sued to recover damages. He recovered at the Circuit, and the defendant appeals.

F. Loomis, for the appellant.

Samuel Hand, for the respondent.

LEARNED, P. J. :

As the acts of the conductors in the scope of their duty are the acts of the defendants, the case stands thus : The defendants contracted with the plaintiff to take him from Sing Sing to Rhinebeck. They gave him a ticket which he was to show in the cars, when requested, and to surrender to them on demand. After he had traveled for some distance, they required him to surrender his ticket, and he did so. Then they requested him to show it, and as he could not do this they put him off the cars.

If the train, on which the plaintiff started, had gone through to Rhinebeck, there would probably be no question made of the defendants' liability. No one would claim that a conductor can take up a passenger's ticket, and then put him off the cars for his inability to show his ticket, without rendering the company liable. What difference can it make that the plaintiff was obliged by the defendants to get upon another train in order to complete his journey ? The defendants urge, that, as he had no ticket when he got on the train at Poughkeepsie, he was to blame for thus attempting to continue on his way to Rhinebeck. But he had no notice that he needed a ticket any longer. The company had taken up that which he had. He might naturally have supposed that no further call would be made on him. If he had stayed at Poughkeepsie, without attempting to go farther north, that would have been his fault or negligence ; and he would have had no complaint against the company. If he had bought another ticket at Poughkeepsie, and had then sued the company for the extra sum paid, what cause of action would he have had. They would have justly said : We never refused to carry you to Rhinebeck. Taking up your ticket was no refusal. We always take up tickets at some point before the end of the journey.

To require a passenger to show a ticket may be reasonable ;

but a company cannot require a passenger to comply with a regulation, compliance with which they have themselves prevented. Nor can it be said that the act of the conductor, in taking up the ticket, was wrongful toward the passenger. The company might take up their tickets wherever they chose, * but they could not, by so doing, acquire the right to refuse to transport the passenger.

No question arises here whether it would have been proper for the plaintiff to attempt to force his way into the car at Poughkeepsie, without a ticket, if his entrance had been objected to on that ground. He went into this car without objection, and in accordance with the custom of those travelers on the Poughkeepsie train who were going farther north. "It follows," as was said by the Court of Appeals, "that if the plaintiff was entitled to a passage on the car in question, without the payment of any additional fare, his ejection therefrom was unlawful.† That case seems to be closely analogous to the present. In the case of *Weaver v. Rome, etc., R. R.*,‡ the plaintiff was negligent. Paying for three tickets, he neglected to obtain more than two. And he was therefore at fault; like a passenger who loses his ticket. There was no injustice, therefore, in making him bear, so far as his right to travel went, the consequences of his carelessness. But in the present case, the plaintiff was not to blame. He yielded to the demand of the defendants, a demand which they had the right to make, it would seem, when he first entered the car at Sing Sing.§

The decision of this case in the Court of Appeals,|| held that exemplary damages were not proper. And the charge of the judge at the Circuit on this trial, limited the jury to damages in compensation.

The judgment should be affirmed.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

* *Northern R. R. Co. v. Page*, 22 Barb., 130; *Vedder v. Fellows*, 20 N. Y., 126.

† *Hamilton v. Third Av. R. R. Co.*, 53 N. Y., 25.

‡ 3 N. Y. S. C., 270.

§ *Northern R. R. Co. v. Page*, *ut supra*.

|| 56 N. Y., 295.

EDMUND H. WATKINS, APPELLANT, v. TIMOTHY D.
WILCOX AND OTHERS, RESPONDENTS.

Religious corporation organized under act of 1813—status of—when must be party to action—when one corporator may bring action to set aside conveyance made by it—right to vote.

In an action brought to set aside an order changing the name of a religious corporation, the corporation must be a party.

When property of a religious corporation is sold for its full value, and the only objection to the sale lies in alleged irregularities in the proceedings before the County Court, an action by a corporator to declare the conveyance made by the corporation void, will not be sustained.

A corporation formed under section 2 of "an act to provide for the incorporation of religious societies," passed April 5, 1813, is not an ecclesiastical corporation in the meaning of the English law; but the majority of the corporators have the right to control the corporate body in accordance with their beliefs, and they are free from any ecclesiastical restriction. It is a connection with the particular society, not with the denomination at large, that gives the right to vote.

APPEAL from a judgment in favor of defendant, entered at the Tompkins Special Term.

The religious society which is the subject of controversy in this action, was incorporated at Ithaca, New York, on the 8th day of April, 1830, under the general act for the incorporation of religious societies, passed April 5th, 1813. The corporate name of the society was "The Elders and Deacons of the Reformed Protestant Dutch Church of Ithaca."

The ecclesiastical body, or church, established their ecclesiastical relations with the classis of Geneva.

The plaintiff was a member of the congregation at the organization of the society in April, 1830, and continued such member of the society and church till December, 1872.

The church body remained in ecclesiastical connection with the classis of Geneva till December, 1872, when, by the unanimous vote of the church, except the plaintiff, and by the unanimous vote of the society, except the plaintiff, this ecclesiastical connection was severed.

On the 17th day of February, 1873, a contract was made for the sale of the parsonage.

On the 29th of March, 1873, the name of the society was changed by order of Hon. D. BOARDMAN, a justice of the Supreme Court, in accordance with chapter 464, Laws of 1847, and chapter 323, Laws of 1853.

Samuel A. Foot, for the appellant.

F. M. French, for the respondents.

LEARNED, P. J.:

The plaintiff asks for relief in several respects.

First. He asks that an order of a justice of this court, changing the name of a religious corporation, be declared void. The corporation is not a party to this action, and he is only one of the corporators. It was not necessary that all the corporators should be heard upon that application.* I do not see that he has any standing in court on that point.

Second. He asks that an order of the County Court, authorizing the sale of certain real estate of this corporation, together with the sale in pursuance thereof, be declared void. The purchaser is a party to this action.

There may be cases in which a corporator, making the corporation a party, can sustain an action in equity to declare a conveyance, made by the corporation, to be void. Such would be a case of fraud and collusion between the purchaser and the officers of the corporation. There is nothing of that kind alleged. It is not pretended that the property was not sold for a fair price and paid for *bona fide*; or that the avails were not applied as directed by the order. The objections raised touch the legal regularity of the proceedings before the County Court, and the validity of the deed. If the purchaser's title be defective by reason of any of these matters, it will be time enough to try that question when the corporation shall bring ejectment against him. The plaintiff does not show himself to be wronged, when the corporation has received full payment for property which they have, as he alleges, failed to convey by a good and valid deed.

Third. He asks a judgment declaring that the persons who, pre-

*Laws 1853, chap. 323.

vious to a day named, were members of a certain religious corporation, and who seceded that day, ceased to be members of said corporation. So far as the words, "members of that church," imply religious rights and privileges, we have nothing to do with the matter. So far as they imply civil rights — that is, rights to property, or rights in a legal corporation — no judgment would be valid, because those persons are not parties. Furthermore, we are not to pass on the mere question, who were incorporators at a certain time, until some one claims that his rights, as such incorporator, were interfered with; and then we have only to do with his own case.

Fourth. The principal matter however involved, is, the question whether, or not, certain of the defendants are now the lawful trustees of this corporation; and the principal relief asked is, that the transfer to them of the care of the temporal affairs should be held void, and that the consistory, as constituted in 1872, should be adjudged entitled thereto.

The incorporation in question was formed under section 2, of "an act to provide for the incorporation of religious societies," passed April 5th, 1813, under the name of "The Elders and Deacons of the Protestant Reformed Dutch Church of Ithaca." It was in connection with the general synod of the Reformed Church in America, and with the classis of Geneva, an inferior ecclesiastical body connected therewith.

In July, 1872, a large majority of the church and congregation petitioned the classis to dismiss the church from its ecclesiastical connection. Nearly all the consistory did the same. A meeting of the consistory in October, 1872, with one only dissenting (the plaintiff), requested the dissolution of the relation between the church and that classis. The matter was referred by the classis to a committee, who reported, and whose report was adopted April, 1873. In that report the committee state that the connection between this church at Ithaca and the classis, "was and is voluntary, and that either party has the legal right to terminate it whenever such party shall think proper." But the classis declined to terminate the connection itself.

In December, 1872, a resolution was passed by the congregation, recommending that the church sever its relations with the body with which it was connected. The vote was twenty-three male persons in

favor, and one opposed; sixty of all present in favor, and one opposed. The same day the church voted to disconnect itself from the classis of Geneva, and the general synod of the Reformed Church of America. The vote was sixteen male members in favor, and one opposed; and forty-six of all members, male and female present, in favor, and one opposed.

In February, 1873, the consistory of the church voted to confide the management of the temporal concerns to a body of nine trustees, under chapter 90, Laws 1835; and trustees were elected accordingly. Subsequently, an application was made to a justice of the Supreme Court for a change of the name of the church, and it was changed accordingly to "The First Congregational Church of Ithaca, New York." This application was in accordance with a unanimous vote, at a meeting where nearly all the members of the church were present.

In all this, how has the plaintiff been injured? The change of name is not, of itself, a change of religious doctrine or systems; although it may be significant of such a change. For instance, if the name had been changed to "The Catholic and Apostolic Church of Ithaca," it would not follow that the defendants had adopted the Irvingite belief.

Then, as to the election of trustees to manage the temporal affairs of the church, that is a course quite consistent with the doctrines of the Dutch Reformed system, and adopted by some of their churches. In fact, the law was passed for their especial benefit.

The consistory, or the church, have elected or called a clergyman who is a Congregationalist. But it appears that clergymen of the Congregational order have, in other instances, preached in Dutch Reformed churches. The plaintiff, however, states that he cannot conscientiously worship with this Congregational church. This would, however, seem to be owing to a change in the form of worship, as there is no proof of any material change in doctrine.

But it may be well to examine this case on the broad grounds raised by the plaintiff's counsel. In substance, these are, that, as the majority of the congregation have severed themselves from the old ecclesiastical connection, the property belongs to the minority. It is important to notice here, that the law of charitable uses has

no existence in this State. "Corporations take and hold property only to the amounts, and *for the purposes prescribed* by their charters or acts of incorporation." * And, in the act to provide for the incorporation of religious societies, † the only purpose prescribed is to be found in section 4. There it is said that the trustees of every church, congregation or society, hold the real and personal estate "for the use of such church, congregation or society, or other pious uses."

So far, then, as the express language of the act goes, there is nothing which declares that the trustees hold the property for the support of the believers in any particular tenets. That act is one in all its scope. It provides for the incorporation of religious societies in three different cases: First, in the Protestant Episcopal churches; second, in the Dutch Reformed; third, in all others. In each instance it provides for the election of persons to be trustees. In the first, these are the rector, wardens and vestrymen; in the second, the minister, elders and deacons; in the third, those who are elected trustees. But in each case their authority is not by virtue of any ecclesiastical office; it is simply because the law declares them to be trustees. And section 4 speaks of all these trustees alike, giving them, in each case, the same powers.

I see no reason to think that the trustees of societies organized under one section of this act, have any different rights or authority from the trustees of societies organized under either of the other sections; or that any system was intended to be established under section 3, different from that established under sections 1 and 2. The counsel for the plaintiff urges strongly that the contrary is true, and that an *ecclesiastical* character is possessed by the societies formed under sections 1 and 2, which does not belong to those formed under section 3. But we must notice that there are many other large denominations which are as thoroughly organized, and are as much accustomed to have what, by a misnomer, are called ecclesiastical courts, as either of those denominations named in the first and second sections. Such, to name no others, are the Presbyterian, the Methodist Episcopal, the Lutheran. Now, the religious societies connected in belief with these organizations, must

* Holmes v. Mead, 52 N. Y., 832.

† Laws of 1813, chap. 60.

incorporate themselves under the third section of the act, and have done so. To take the Presbyterian denomination as an illustration: it has its session, presbytery, synod, and general assembly; very closely analogous to the consistory, classis, particular synod and general synod of the Dutch church.

And while it is not easy to measure ecclesiastical claims to jurisdiction, those of the Presbyterian denomination are probably as comprehensive as those of the Dutch Reformed. Unless, then, there should be some very positive indication to the contrary, it would be unreasonable to think that any different rights or duties were given by the same act to the religious societies and their trustees incorporated by the Dutch Reformed, from those given to the societies and their trustees incorporated by the Presbyterians.

The act was intended to form a general system, and to make only such variations as would facilitate, in each denomination, the election of trustees, by harmonizing such election with old and existing customs.

I think, then, that the law of this case is settled by the decision of *Robertson v. Bullions*,* and by the cases which have followed the views there expressed. Religious societies are not ecclesiastical corporations in the meaning of the English law. They are civil corporations. The corporation consists not of the trustees but of the members of the society. And, in the language of that decision, "it was the intention of the legislature to place the control of the temporal affairs of these societies in the hands of a majority of the corporators, independent of priest or bishop, presbytery or synod, or other ecclesiastical judicatory." The doctrine laid down in that case is affirmed, in language directly applicable to the present controversy, in the case of *Petty v. Tooker*,† and again in *Gram v. Prussia Society*.‡ It is followed in *Burrell v. Associate Reformed Church*.§ And whether these decisions were made in cases of corporations organized under the third section, or under the first and second, does not seem to me to have been considered important. The language of the decisions is general, and in no respect limited. And, if we examine the act in question, we shall find that all the provisions giving rights and powers to the trustees, are general; and that the only distinction is in respect to the mode of election.

* 11 N. Y., 243. † 21 N. Y., 267. ‡ 36 N. Y., 161. § 44 Barb., 289.

- Thus, section 4, already mentioned, defines the powers of the "trustees of every church congregation or society hereinabove mentioned." Section 8 deprives the trustees of "any church congregation or society," of the power to fix the salary of a minister. Section 9 authorizes "any religious corporation," etc., to reduce the number of its trustees. Section 11 gives the general power to apply for leave to sell real estate.

It is insisted that one qualification of a voter in corporations, under the second section, is to be a communicant in good standing, and that the members of this church have ceased to be such. The legislature, by the act of 1836, * authorized any church in connection with the Reformed Dutch, to modify its system by electing trustees. It is not found by the referee that the persons who voted for these trustees were not members of that church in good standing. The consistory of the church is the tribunal which decides on the standing of the members, and that body had not excommunicated any of these. Their right to vote was undisturbed. If we look at the first section of this act by way of illustration, we shall see that the right to vote depends on connection with the particular organization — the individual society. The voter is one "who shall have belonged to such church or congregation," etc., "or by some joint act of the parties and of the rector, whereby," etc. Thus it is a union or connection with the particular society, not with the denomination at large, which gives the right to a vote. The same is seen in section 3, qualified by section 7, making stated attendance and contribution the qualification. And analogy shows that, under the second section, the good standing which is said to be necessary under "the rules and usages," is a good standing in the particular church or society. It seems to me, therefore, to follow from the decisions last above mentioned, and from the case of *Holmes v. Mead*, that the majority of the corporators have the right to control, and that they are free from any ecclesiastical restrictions. † If there is anything contrary to this view in *Watson v. Jones*, ‡ or in the decisions of other States, it is not binding.

And I fully agree with the principle which thus seems to me to be established. In spite of written symbols, the beliefs of men

* Chap. 90. † See, also, *Austin v. Searing*, 16 N. Y., 118. ‡ 13 Wall., 714.

change, and have changed; and I look with no favor on a rule which would permit the past generations to appropriate property to the support of their beliefs, so permanently as to deprive the present of the use of such property, in case those old beliefs shall have passed away.

The judgment should be affirmed, with costs.

Present — LEARNED, P. J., and JAMES, J.

Judgment affirmed, with costs.

JOHN C. BROWN, RECEIVER, ETC., RESPONDENT, v. EDWARD
J. BURHANS, APPELLANT.

Warranty — when may exist with executory contract — Caveat emptor — when language only descriptive.

A warranty may exist in the case of an executory contract, when the defect in the property is incapable of discovery at the time of delivery. In such case the purchaser may retain the property and sue upon the warranty; but if the defect is open, visible, and notorious at the time of delivery, the purchaser is bound to reject the articles and refuse to receive them as a compliance with the contract, or he will waive his right to damages.

Parks v. The Morris Axe Company (54 N. Y., 586) followed.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The plaintiff brought the action as the receiver of the property of Varner D. Perry, to recover a balance claimed to be due Perry for pine lumber sold to defendant. The referee found that, in the fall of 1869, Perry delivered to defendant, in Roxbury, Delaware county, 12,000 feet of pine lumber, for which defendant paid him thirty-five dollars per thousand. This lumber was good; called first and second qualities. After the delivery of this quantity, Perry entered into another contract with defendant, by which he agreed to deliver to him, at Roxbury, 100,000 feet of pine lumber, at the price of thirty-five dollars per thousand feet. Perry agreed that this lumber should be as good as the 12,000 feet previously

delivered. That Perry, between November 1st, 1869, and July 1st, 1870, drew and delivered to defendant 116,000 besides the first 12,000. That defendant paid Perry for 100,292 feet of the lumber, at the rate of thirty-five dollars per thousand, and that 15,708 feet were not paid for. That the defendant received this amount and converted it to his own use. That the 100,292 feet which was paid for, was, a large portion of it, of the third and poorer quality, and the average value thereof was ten dollars less per thousand feet than if it had been of as good quality as the contract called for : as good as the first 12,000. That said defendant examined and found fault with the 100,292 feet of lumber during the time it was being delivered, and on several different occasions notified said Perry that the same did not conform to the contract, and that he would not receive the same ; refused to let Perry leave such lumber on his premises, and ordered him to take it away. That, at the time defendant paid the last installment on the 100,292, he notified Perry that he made it under protest, and would sue him for the damages sustained by him in consequence of the lumber's not being as good as Perry agreed to deliver. The referee also finds that the 15,708 feet were of the second, third and fourth qualities, and worth only about twenty dollars per thousand. That Perry claimed that the lumber cost thirty dollars per thousand at the mill, and all he wanted was five dollars per thousand for drawing it, when, in fact, it cost but twenty-six dollars per thousand, and that defendant knew this at the time he paid Perry.

The referee found, as conclusions of law, that defendant, having accepted and paid for 100,292 feet at the contract-price ; having had full opportunity to examine the same, and with full knowledge of its defects, and not having returned or offered to return the lumber, but having converted the same to his own use, was presumed, in law, to have acquiesced in its quality, and his right to recoup or counter-claim damages did not survive such acceptance. That defendant, having paid Perry for lumber at thirty-five dollars per thousand, with knowledge that it only cost him twenty-six dollars at the mill, was thereby estopped from recouping damages on account of any misrepresentations made by Perry in that particular. That there was no special bargain made as to price of 15,708 feet, and the defendant was, therefore, obliged to pay what it was actually worth.

Gilbert & Maynard, for the appellant. The vendee in an executory contract of sale, with warranty as to the quality of the article contracted for, upon receipt of the article and subsequent discovery of a breach, is not bound to return or offer to return the property, but may retain and use the same, and have his remedy upon the warranty. (*Day v. Pool*, 52 N. Y., 416.) Upon a sale of goods, to be delivered at a future day, with an express warranty as to quality, the right of action for a breach survives the receipt and use of the goods without notice of defects, or offer to return. (*Waring v. Mason*, 18 Wend., 425; *Voorhies v. Earl*, 2 Hill, 288; *Cary v. Graman*, 4 id., 625; *Burns v. Dodd*, 5 N. Y., 95; *Reed v. Randall*, 29 id., 358; *Foote v. Bentley*, 44 id., 166; *Muller v. Eno*, 14 id., 597; *Bennett v. Cook*, 45 id., 265.)

George Ades, for the respondent. "The defendant, having accepted and paid for 100,292 feet of pine lumber, at the contract-price, and having had full opportunity to examine the same, with a full knowledge of its defects, and not having returned, or offered to return said lumber, but having converted the same to his own use, is presumed, in law, to have acquiesced in its quality, and his right to recoup or counter-claim damages does not survive such acceptance." This was a parol executory contract for the sale and delivery of 100,000 feet, or more, of pine lumber, at thirty-five dollars per thousand, and although, perhaps, void by the statute of frauds at its inception, yet it was rendered valid and binding upon the parties by a subsequent delivery and acceptance of the lumber. (1 *Wait's Law and Practice*, 472, and cases cited; *Sprague v. Blake*, 20 Wend., 61; *Flanagan v. Demarest*, 3 Rob., 173; *Warran v. Van Pelt*, 4 E. D. Smith, 202; *McKnight v. Dunlap*, 5 N. Y., 537.) In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages, on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the property by the vendee after opportunity to ascertain the defects, unless notice has been given to the vendor, or the vendee offers to return the property. (*Reed v. Randall*, 29 N. Y., 358; *Parks v. Morris Axe and Tool Co.*, 54 id., 586, 590; *Pomeroy v. Shaw*, 2 Daly, 267; *Fisher v.*

Merwin, 1 id., 234; *Rust v. Eckler*, 41 N. Y., 488; *Peterson v. Ayers*, 24 E. L. and E., 382; *Weaver v. Wisner*, 51 Barb., 638; *Leavenworth v. Packer*, 52 id., 182; *Fitch v. Carpenter*, 43 id., 40, per MILLER, J.; *Delafield v. DeGraw*, 9 Bosw., 1; S. C., 3 Keyes, 467; *Pike v. Nash*, 1 id., 335; *Fisher v. Samunda*, 1 Camp., 190; *Hopkins v. Appleby*, 1 Stark., 477.) A refusal to receive means never to receive, unless there should be a subsequent arrangement, or some understanding made between the vendor and vendee. (*Sprague v. Blake*, 20 Wend., 60, and cases cited; *Reed v. Randall*, 29 N. Y., 358, 365-367; *Hargons v. Stone*, 5 id., 73, 86; *Howard v. Hoey*, 23 Wend., 351; *Hart v. Wright*, 17 id., 277; S. C., 18 id., 449; 2 Kent's Com., 480; *Chanter v. Hopkins*, 4 Mees. & Welb. [Exch.], 399.)

BOARDMAN, J.:

I think the judgment should be affirmed. In my judgment there is no warranty. The language used in making the contract was simply descriptive. It would have been the same if Perry had said, I will sell you 100,000 feet of first and second quality of lumber, and delivered the same lumber in performance. In such a case, *Reed v. Randall** would control.

But if it can be said that there is a warranty, still a warranty does not apply to open and visible defects. The principle expressed in *Parks v. The Morris Axe Co.*† is, that a warranty may exist and be enforced in the case of an executory contract, when the defect in the property is incapable of discovery at the time of delivery. Under such circumstances, the purchaser may retain the property and sue upon the warranty. But if the defect is open, visible and notorious, at the time of delivery, the purchaser is bound to reject the articles, and refuse to receive them as a compliance with the contract, or he will waive his right to damages. If I sell a horse with warranty of soundness, he having one ear off, and the purchaser accepts him, seeing the defect, he cannot afterward sue for such defect, and recover damages therefor. So in this case, the purchaser received this lumber with full knowledge that it was inferior to that contracted for and paid for, and converted the same to his own use. The case last cited, and others of like

*29 N. Y., 358.

†54 N. Y., 596.

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import, all recognize a distinction between the acceptance of articles with latent defects, and those having open and visible defects. In the latter case, the purchaser should be estopped from claiming damages where he had accepted the property under a contract, with full knowledge of the facts. *

The referee does not find any warranty. The evidence does not establish a warranty. The defendant did not rely upon a warranty when he accepted the lumber, because he then knew the lumber was defective. Perry did not own the lumber when the contract was made. He bought it to make his profit by teaming. Under all these facts it would not be fair dealing to allow defendant to take the lumber and pay for it on the contract, and then maintain an action for damages upon a claim of warranty.

I think the judgment should be affirmed, with costs.

LEARNED, P. J., concurred.

Judgment affirmed.

EDWARD D. CLAYES, APPELLANT, v. HENRY HOOKER
AND ALFRED BAKEN, RESPONDENTS.

Usury—governed by lex loci contractus—how pleaded—variance.

A promissory note, made, dated and payable in this State, is, so far as the question of usury is concerned, a New York contract, and its validity is to be determined by the laws of this State, although negotiated in a foreign country, at a rate lawful there but usurious here.

In pleading usury, the transaction should be correctly set out in substance; but where on the trial the evidence tends to prove a usurious agreement, differing from the one alleged in the answer in several particulars, but not in its entire scope and meaning, and the plaintiff is not misled thereby, the variance will be deemed immaterial.

APPEAL from a judgment in favor of the defendants, entered upon the report of a referee.

*Schuyler v. Russ, 2 Caines, 203; Wilbur v. Cartright, 44 Barb., 536; Jennings v. Chenango Insurance Co., 2 Den., 79; Birdseye v. Frost, 34 Barb., 367; see also East v. Eckler, 41 N. Y., 488.

Vary & Stone, for the appellant. The legality of the transaction should be tested by the laws of the place where the contract was made. (*Bowen v. Bradley*, 9 Abb. [N. S.], 395; *Cope v. Wheeler*, 41 N. Y., 303; Story on Conflict of Laws, §§ 364, 367, 372, 424, 427; *Hosford v. Nichols*, 1 Paige, 220; *Abul v. Douglas*, 4 Denio, 305; *Young v. Brush*, 28 N. Y., 674; *Nichols v. Levett*, 4 Sandf., 253, 276; *Balme v. Wombough*, 38 Barb., 352; *Backman v. Jenks*, 55 id., 468, opinion by BOOKER.) The answer must set out the usury correctly. (*Manning v. Tyler*, 21 N. Y., 567; *Cutler v. Wright*, 22 id., 472.) The case of *Jewell v. Wright* (30 N. Y., 259), only decides that, when the rate of interest is illegal both at the place of discount and the place of payment, on an attempt to enforce payment in this State, the laws of New York applicable to forfeiture for usury will control. Beyond this it has not been followed. (*First National Bank, N. Y. v. Morris*, 8 Sup. Ct. [1 Hun], 680; *City Savings Bank v. Bidwell*, 29 Barb., 325; *Bowen v. Bradley*, 9 Abb. [N. S.], 395; *Bank Georgia v. Lewin*, 45 Barb., 340.) In the administration of the bankrupt act, notes made and signed in Philadelphia, but delivered and discounted in New York, are governed, as to the question whether they are void for usury, by the laws of New York. The place where a note is first negotiated is the place of the contract. 1871, *Matter of Conrad* (8 Phila. [Pa.], 147.) "Phila. [Pa.]," means Federal and State Courts Decisions, published in the Legal Intelligencer during 1870 and 1871, by Henry E. Wallace; Vol. 8.

Myers & Morris, for the respondents. The note being made and also indorsed in this State, and payable in this State, the laws of this State are to govern, so far as the defense of usury is concerned. (*Cutler v. Wright*, 22 N. Y., 472; *Jewell v. Wright*, 30 id., 259; *Hacketstown v. Rea*, 6 Lans., 455; *Williams v. Fitzhugh*, 37 N. Y., 451, 452; *Cope v. Wheeler*, 41 id., 303, 309.) The note having been discounted before inception, at a greater rate than seven per cent per annum, is usurious and void. (*Catlin v. Gunter*, 11 N. Y., 368; *Newell v. Doty*, 33 id., 83.) The rules provided by the Code in relation to a variance between the pleading and the proof, apply as well to the defense of usury as to other defenses; and the strict rule which formerly prevailed as to this defense, has

been changed by the Code. (*Catlin v. Gunter*, 11 N. Y., 373, 374, 375; *Dagal v. Simmons*, 23 id., 491-493; *Griggs v. Howe*, 3 Keyes, 169.) A statement of the usurious agreement, in substance, is all that is required. (23 N. Y., 493; 11 id., 375, 376.) Where the transaction is alleged to be that of the principal, and it turns out on the trial to be that of the agent (which is this case), the variance is not fatal, but is the subject of an amendment, and may be disregarded on appeal. (*Bennet v. Judson*, 21 N. Y., 238.) The case, as printed, does not show the answer to have been amended; but that cannot be taken advantage of on appeal so long as the amendment was allowed. The court has the right to allow an amendment even on appeal. (*Bate v. Graham*, 11 N. Y., 237; *Foot v. Roberts*, 7 Rob., 17; *Bowdoin v. Coleman*, 3 Abb., 431; *Harrower v. Heath*, 19 Barb., 331, 338; *Cady v. Allen*, 22 id., 338.)

JAMES, J. :

This case comes here by appeal upon a case and exceptions. The facts found by the referee are not excepted to; the only exceptions noted are to the conclusions of law found by the referee. The action was to recover on a promissory note of \$1,000, made and dated at Morristown, New York, October 11, 1872, and payable at the First National Bank of Syracuse, New York. The makers of the note were the firm of Burrows, Bro. & Co.; it was indorsed by Ford, one of said firm, and by the defendants as accommodation indorsers. All the parties but Ford were at the time residents of Morristown, aforesaid. The defense was usury. It appeared that after the note was made and indorsed, Burrows, one of the firm of makers, took this note and other notes to Brockville, Canada, and applied to one Harding to raise money; asked Harding to discount said notes. Harding said he was short, but would buy the notes if he could raise the money. Burrows inquired if he could not raise the money from the banks or from Clayes (who is the plaintiff), or from other persons; Harding said he would see. Harding did apply to plaintiff to buy said notes, and plaintiff thought he would. Afterward, Burrows sold to Harding the note in suit; another note made and indorsed by the same parties for \$500, at four months; five business notes, amounting to \$791.97 (amounting in all to \$2,291.97), and

delivered as security for the business notes, another note, dated October 11, 1872, at four months, made by Burrows, Bro. & Co., and indorsed by Ford. That said notes were sold by Burrows to Harding, at a discount of over twelve per cent per annum for the time they had to run before maturity. After this agreement between Burrows and Harding, and the delivery of the notes, Harding sold the note in suit of \$1,000, the other \$1,000 note delivered as security for the business notes, and the \$500 note (they all then having less than four months to run), to the plaintiff for \$2,405, a discount of over ten per cent; and after such sale to plaintiff, Harding paid to Burrows the purchase-price of said notes. Such sale or sales were lawful in Canada. The note in suit was, at maturity, duly presented and protested. The referee held that the validity of said note must be determined by the laws of this State; that by such laws the sale to Harding was usurious; that never having had a valid inception before its transfer to the plaintiff, it was in his hands usurious and void; and that defendants were entitled to have their answer amended so as to conform to the facts proved.

As a general rule, the law of the place where contracts, purely personal, are made, must govern as to their construction and validity. In this case, the note was made and dated in the State of New York, and payable in this State, and therefore, by the laws of this State, so far as the question of usury is concerned, it is to be treated as a New York contract, and its validity construed by the laws of this State, although negotiated in a foreign country, at a rate lawful there but usurious here.*

Under the laws of this State, the negotiation of the note in suit was usurious and void. I am aware that these cases in the Court of Appeals have been reviewed by the Superior Court of Buffalo, in *Bowen v. Bradley*,† and pronounced unsound. Still I feel bound to follow the appellate court. The rate deducted from these notes at the time of sale, is stated in the finding at twelve and a half per cent per annum, and I think that finding was warranted by the evidence.

* *Curtis v. Leavitt*, 15 N. Y., 9, 227; *Jewell v. Wright*, 30 id., 259; *Cope v. Wheeler*, 41 id., 303.

† 9 Abb. (N. S.), 395.

In pleading usury, the transaction should be correctly set out in substance.* I think the answer does substantially state the transaction as proved and as found by the referee. It is claimed that the answer sets up usury in the purchase by the plaintiff, and that there was no usury in such purchase. That, however, depends upon Harding's true position in the transaction. Was he, in reality, the purchaser from, or the agent of Burrows? If Harding was a purchaser, the transaction with him was usurious; if an agent, the transaction with plaintiff was usurious. As it affected the defendants, the transaction was usurious whichever way is the truth. And it is even now quite difficult to determine Harding's position. He made the contract of purchase, but did not pay therefor until after the sale to plaintiff. But as this was only a question of pleading, the usury being established, it was proper to allow the answer to be conformed to the facts proved. It is one of the cases contemplated by section 173 of the Code. While the Code has not relaxed the rule requiring facts to be stated in a pleading essential to make out usury, as to variances, its provisions are as applicable to usury as to other cases.

It was held in *Catlin v. Gunter*, † that when, on the trial, the evidence tended to prove an usurious agreement, differing from the one alleged in the answer in several particulars, but not in its entire scope and meaning, the plaintiff giving no proof that he was misled thereby, to his prejudice, the variance should be deemed immaterial.

The case was properly disposed of, and the judgment should be affirmed.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

* 25 N. Y., 49, 143.

† 11 N. Y., 368

JOHN M. PECK, RESPONDENT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
APPELLANT.

Railroad Co. — when liable for acts of its agents — act within scope of employment — Excessive damages — verdict of jury — when set aside for.

Where a brakeman who had been directed to notify passengers attempting to enter a certain car that it was reserved for ladies, and to show them to some other car, removed from said car a person who had entered it, after being forbidden to do so, and in so doing used unnecessary violence: *held*, that, even if the brakeman exceeded his orders in ejecting the plaintiff, yet, as between the latter and the company, it was enough that the act was done in the prosecution of the company's business, and that it was liable therefor.

In actions other than those on contracts, sounding in damages, it is strictly within the province of the jury to estimate the loss suffered, and courts will not interfere unless there is manifest abuse, or the sum is so large as to show that the jury were affected by passion, prejudice or some undue influence

APPEAL from an order denying a motion for a new trial, made on the minutes of the justice before whom the case was tried.

This action was brought to recover damages alleged to have been sustained by being forcibly removed from one of defendant's cars, by an employe of the company. The jury found a verdict in favor of the plaintiff for \$5,000.

A motion was made on the minutes for a new trial, and denied, with leave to make a case and exceptions to be heard at the General Term, in the first instance.

Frank Loomis, for the appellant.

A. J. Parker, Jr., for the respondent.

JAMES J.:

On the 10th of January, 1871, the plaintiff, having purchased a ticket for defendant's road, sought to enter a car and was notified by an employe of the company that the car he was about to enter had been set apart for ladies, and gentlemen accompanying ladies, and directed him to a forward car. This employe had been stationed at the train by a person in charge

there, directed to prevent gentlemen, unaccompanied by ladies, from entering said car. On receiving the notice and direction, plaintiff got upon the platform of a car next in rear of the ladies' car, looked in a moment, then turned and entered said ladies' car; the employe arrested his progress, and removed him from the car by force.

When the plaintiff rested his case, a motion was made for a nonsuit, on the ground that the brakeman was not acting within the scope of his employment in removing plaintiff, and therefore defendant was not liable for his act. This motion was denied, and defendant excepted.

That a master is not liable for the wrongful acts of his servant, unless done in his service, and within the scope of his employment, will not be disputed. If the employe who removed the plaintiff is to be regarded as a brakeman, unauthorized to perform any duties other than such as pertained to that office, and volunteered the act in question without other authority or direction, then the defendant was not liable in this case. But, as brakeman, he was an employe of the company, subject to its authority and the direction of its officers, and, as such employe, he was directed by the person in charge to see that gentlemen, without ladies, did not enter that car, and it was in the performance of that service he did the act complained of. It is true he was not ordered to remove persons from the car; his orders were to notify gentlemen not in charge of ladies that such car was reserved, and direct them to cars forward; so that, in removing plaintiff, he clearly exceeded the orders given him. But this fact the plaintiff could not know. As between him and the company, it was enough that the act was done in the prosecution of his, the master's, business, and if the servant deviated from, or exceeded his instructions, that fact did not excuse the master from responsibility. The order to the brakeman, and his performance of it, warrant the conclusion, even as a matter of law, that he was acting within the scope of the employment he was there set to perform, if persons disregarded his directions and persisted in entering the car.

The defendant had the right to set apart a car for lady passengers, and exclude other persons from it; if other persons, after notice, persisted in entering it, the defendant had the right to

enforce their removal, using no more force than necessary for that purpose. The brakeman did no more than the master had the right to do, under the circumstances, and the presumption is, that in doing it he was acting within the scope of his then employment.* Therefore the motion for a nonsuit was properly denied.

There are several other exceptions in the case, but none which I deem it necessary to discuss; none well taken.

The more important question presented by the case arises on the motion for a new trial, on the ground of excessive damages. It is certain there was no malice in this case, either on the part of the defendant or the servant who did the act complained of; it was simply the exercise of more force than necessary in the accomplishment of a legal act. It was not a case, therefore, calling for punitive damages, but simply one for compensation for the pain, suffering and loss of time occasioned by the act. Upon this question no evidence was given by the plaintiff other than his own; no medical attendant, to show his condition, was called, nor any medical expert to establish that the sickness, pains and sufferings stated by himself, were the result natural or probable of the force used; while a medical expert was called on the part of the defense, who testified that the sickness and pains described by plaintiff, were not the natural or probable result or effect of the force used upon him, and attributed the sickness and pains to causes pertaining to the plaintiff. The plaintiff's statements of his injuries, in their nature and duration, are inconsistent with his condition and acts after the occurrence. His whole statement as to the nature, degree and extent of his injuries, is improbable, from the force used, and the manner of its use upon him, and leaves the impression that his relation of it is highly colored.

In actions other than those on contracts, sounding in damages, it is strictly within the province of the jury to estimate the loss suffered, and courts are reluctant to interfere, and will not interfere, unless there is manifest abuse, or the sum is so large as to evidence that the jury were affected by passion, prejudice or some undue influence. In this action the sum is so large as to demonstrate such to be the case. Five thousand dollars is a sum entirely beyond what was

* See *Higgins v. The Watervliet Co.*, 46 N. Y., 23; *Jackson v. Seventh Av. Co.*, 47 id., 274; *Cosgrove v. Ogden*, 49 id., 255.

justified by the facts. It would seem as if intended as a punishment of the defendant; an amount that would not have been given against a natural person, and it satisfies the mind that the jury were unduly influenced by some extrinsic and unknown cause, or by passion or prejudice against the defendant. In either case the verdict should not be allowed to stand.

For these reasons the verdict should be set aside, and a new trial granted.

Present — BOARDMAN and JAMES, JJ.

Judgment reversed, and new trial ordered on payment by defendant of costs of Circuit.

ELIZABETH LUDLOW, RESPONDENT, v. THE HUDSON
RIVER RAILROAD COMPANY, APPELLANT.

*Lateral support — when owner of adjoining lands estopped from asserting right to —
Effect of deed with habendum "to the uses and purposes" of a railroad.*

The plaintiff conveyed certain land to the defendant, "for materials," "to have and to hold * * * to the uses and purposes of said railroad, and for no other or different purpose." It was understood by the parties that a part of the land was taken as a source from which to obtain material for other portions of the railroad. By reason of the excavation made for that purpose on such part, the other land of plaintiff was deprived of its lateral support, and slid into the excavation. *Held*, in an action brought to recover damages sustained by plaintiff by reason of such slide, that she was estopped from claiming the right to the lateral support by her deed, which contemplated the use made of the land by the defendant.

THIS is an appeal from a judgment for plaintiff, entered on the verdict of a jury at the Columbia Circuit, and from an order denying a motion for a new trial.

The action was brought to recover for damages to land of the plaintiff, by the same sliding down and caving in by reason of excavations and removing of earth by the defendant, at the time of the construction of its road.

F. Loomis, for the appellant.

J. C. Newkirk, for the respondent.

JAMES, J. :

This action was brought to recover for damages sustained by the plaintiff by the sliding down of her land into an excavation made by the defendant adjoining thereto in obtaining materials for the construction of its road-bed. The excavation was made in 1851, 1852, and 1853, and the sliding down was in 1864. The plaintiff had a verdict and judgment.

The principal and the important question presented by this case, is as to the plaintiff's right to the lateral support of the land excavated and removed, under the facts of this case.

Previous to February, 1851, the plaintiff owned all the land in question. In that month of that year, she, for a valuable consideration, sold and conveyed to the defendant a strip of land across her farm, 100 feet wide, for a roadway for defendant's railroad, and also another piece of land east of the east line of said roadway, "*for material*," to have and to hold said parcels of land to said defendant as a corporation, "its successors and assigns, to the uses and purposes of said railroad, and for no other or different purpose." In 1851, the defendant entered upon said parcels of land and began the construction of its road-bed, and continued until finished, and, at the same time, to obtain materials wherewith to construct said road-bed, the defendant excavated and removed the soil from said last named piece, until the excavation reached the depth of thirty feet, thus weakening the lateral support to adjoining lands of plaintiff, to such a degree that the soil slid down into said excavation as alleged in the complaint.

The question of negligence does not arise on this appeal, because the court instructed the jury, "if they found the sliding down of plaintiff's land was occasioned by excavation on, and the removal of the earth from, the parcel sold for materials, the defendant was liable under the law;" and the same in substance was repeated and assented to by the court, in answer to repeated requests to charge by the counsel for plaintiff.

The purposes for which defendant desired the land were well known to the plaintiff at the time of executing her deed, and were quite clearly expressed therein; and the presumption is that a price therefor was asked and given commensurate with its value and the

consequences likely to follow from its excavation and use for the purposes contemplated.

It is clearly apparent that these parcels of land were of no particular value to the defendant, except for railroad purposes, and the one parcel was only desired for the *material* which might be obtained from it for the purposes of constructing its railroad; and if taken and used for that purpose, it could not longer furnish lateral support to adjoining lands. As the plaintiff owned the entire territory, the part excavated as well as the part which slid down, and saw fit to sell a portion thereof for removal, with the right to excavate and remove, it amounted to a legal consent that the lateral support furnished by such piece of land to her other land adjoining, might be withdrawn, and thereby released the grantee and his assigns from any damages which might arise to such adjoining soil by any excavation or removal of soil therefrom. The plaintiff is therefore estopped by her deed from claiming damages.

An estoppel arises where one has done some act, or executed and delivered some deed, which precludes him from averring the contrary. Here the defendant did an act authorized by the deed — an act contemplated and expressly authorized by the deed; and hence the plaintiff cannot complain of, or recover for, damages naturally resulting from a proper exercise of the rights authorized. This parcel of land in the hands of the defendant, was not subservient to the obligation of lateral support to adjoining land owned by the plaintiff. The defendant has not a fee-simple, but only a qualified fee; the mere right to excavate and remove earth therefrom for material for its road-bed, terminating with the use, and then reverting to the plaintiff; in substance and legal effect, a license to excavate and remove. In principle, this case is like that of *Ryckman v. Gillis*, recently decided in the Commission of Appeals. In that case the defendant sold a parcel of land, reserving the right to take clay and sand from a portion of it for making brick. Excavations were made, clay and sand removed, and a slide into the excavation resulted, as in this case. The court held that “the doctrine of lateral support, incident to and affecting adjoining lands owned by different proprietors, did not apply to such case.” I repeat, in principle the cases are exactly alike, and both should be decided the same way.

Judgment reversed, and new trial granted, costs to abide the event.

BOARDMAN, J. (dissenting):

When this action was in this court on appeal from a judgment dismissing the complaint, a new trial was granted, and it was held and decided that the action was not barred by the statute of limitations; that the doctrine of lateral support incident to adjoining lands was applicable, and that the defendant was liable in damages to the plaintiff for the consequences of the excavation made by defendant upon its own lands; and that even if defendant was not absolutely liable for such damages, it would be, if negligently and unskillfully done; and that such negligence and want of skill should have been submitted to the jury, to be passed upon by it as a question of fact.* Such decision covers all the propositions relied upon by the appellant upon his appeal except one. Upon the former trial, the defendant rested entirely upon the production of plaintiff's deed of the premises (whereon the excavation was made) "for materials" "for the uses and purposes of said railroad, and for no other or different purposes." Now, the defendant has introduced, in addition, certain proceedings whereby it obtained title to said premises by the right of eminent domain, under the statutes for taking lands for railroad purposes. By such proceedings it appears that this piece of land outside the line of the road, was "needed for material for the construction of said road and the maintenance thereof," and was appraised and condemned to the use of said railroad. This court has lately held that a railroad company cannot acquire title to real estate without the owner's consent, simply for the purpose of removing materials therefrom for the construction of the road.† If that decision be sound, the defendant acquired no title to the lands outside of the roadway by such proceedings. But in any event the title so acquired did not essentially change the relations of the parties, or diminish defendant's duties and obligations.

These considerations would lead to the affirmance of the judgment without further remark, were we not referred to a manuscript opinion of LOTT, Ch. C., in the case of *Ryckman v. Gillis*, lately

*6 *Lans.*, 128.

† *Matter of N. Y. and C. R. R. v. Gunnison*, 1 *Hun*, 496.

delivered in the Commission of Appeals. The opinion of the learned judge raises grave doubts of the correctness of this court's decision upon the former appeal. There is, however, this marked distinction between the two cases: In *Ryckman v. Gillis*, by the deed, the land was conveyed, and the right reserved to the grantor to enter upon a certain part of the land granted, and "to dig and take therefrom the clay and sand that may be found thereon fit for brick-making." In the case at bar, the plaintiff conveys to defendant, its successors and assigns, the right of way for track, describing it, and adds, "together with a piece for materials," describing the land on which this excavation was made; after which follows the usual clause, with all and singular, etc., and adds, "to have and to hold the same with the appurtenances unto the said party of the second part, its successors and assigns, for the uses and purposes of said railroad, and for no other or different purpose." In the former case the grantor retained no title to the land. If the reservation did not amount to a severance of the clay and sand, so as to constitute it personal property, as in the case of growing trees, it was yet only an irrevocable license to enter, dig and carry away. The grantee alone held the title. Hence the grantor and grantee were not adjoining owners. But in the present case, the defendant has title in the land conveyed to it by plaintiff. While that title remains the plaintiff has no right of entry thereon. Any interference by her with defendant's possession, would be a tort, for which trespass would lie.

Concede that defendant's right of use is limited, and not absolute, it is a title to land which the law tolerates, and the defendant is the possessor of such title and lands.

The doctrine of lateral support can only apply to adjoining owners of land. If such adjoining ownership does not exist, the doctrine cannot be applied. It did not exist in *Ryckman v. Gillis*, but it does here. The use of the land is restricted to railroad purposes. But does that give to defendant any greater rights of use of the soil for railroad purposes, than it would possess if no restriction were contained in the deed? If it does, then a restriction inserted in a deed to limit the use, will operate as a grant of a right which a full covenant deed would not give.

The precise question having been decided in this court, it should

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be held *res adjudicata*, and it should be left to a higher court to correct our error, if it be an error.

For these reasons, I think the judgment and order should be affirmed.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed and new trial ordered, costs to abide event.

CLINTON TAPLIN, APPELLANT, v. ABRAHAM WILSON,
RESPONDENT.

Compromise — ignorance of law — when party not excused by — Settlement of controversy.

The defendant gave to his daughter, the wife of the plaintiff, certain articles of household furniture, which were brought by her to the plaintiff's house, she agreeing with the defendant, without the knowledge of the plaintiff, that in case she died without children, the property should be returned to him. Upon her death defendant demanded the property, and the plaintiff, after consulting a lawyer, delivered the same to him. Subsequently this action was brought by the plaintiff to recover the said property. *Held*, that the action could not be maintained. (JAMES, J., dissenting.)

Westerlo v. De Witt (36 N. Y., 340), *Pitcher v. Plank-road Company* (10 Barb., 436) distinguished.

APPEAL from a judgment in favor of the defendant, entered on the report of a referee.

The plaintiff married Mary Ann, a daughter of the defendant. She died childless, October, 1870. After her marriage the defendant furnished her certain articles of bedding, and gave her money to buy furniture. She bought furniture with this money, and the furniture and bedding were taken to the plaintiff's house. They were used there in his family till her death. When the money and bedding were delivered to her, it was agreed that she should have the property during her lifetime, with the right to use it up. If she died without children, it was to come back. The plaintiff had no knowledge of this agreement. After Mary Ann's death the property remained in the plaintiff's possession, and was used by him as his own. In January, 1872, the defendant claimed the property

from the plaintiff. The plaintiff replied that he would let him know in a fortnight what he would do. The plaintiff then took legal advice. What that advice was does not appear; but, after taking such advice, the plaintiff told the defendant that he wanted to give up the property, and that the defendant might take it. In a day or two the defendant sent to the plaintiff's house and took it. The plaintiff was present when some was taken, and aided in preparing some articles for removal. It was voluntarily delivered by the plaintiff to the defendant on this claim of ownership. About a year afterward the plaintiff demanded the property, and then brought this action.

L. M. & L. K. Soper, for the appellant. Where there is a mutual mistake, and the parties can be restored to their original situation, substantially, a court of equity will relieve. (*Crosier v. Acer*, 7 Paige, 137; 1 Story Eq., § 123; *Champlin v. Laytin*, 6 Paige, 189; S. O., 18 Wend., 407; *Quick v. Stuyvesant*, 2 Paige, 84; *Levy v. Joyce*, 1 Bosw., 622; *Westerloe v. Dewitt*, 36 N. Y., 340; *Lamott's Heirs v. Bowley's Heirs*, 6 Har. & Johns., 500.) Ignorance in point of fact, on the part of plaintiff, of any title in him, was not a mistake of law. (1 Story Eq., § 120; *Ramdsen v. Hylton*, 2 Ves., 304; *Cann v. Cann*, 1 Peere Williams, 727; *Pitcher v. Plank Road Company*, 10 Barb., 436, 439; *McCarthy v. Decaiz*, 2 Russell & Mylne, 614; *Corking v. Pratt*, 1 Vesey, 400; 2 Powell on Contracts, 196; 1 Story Eq. [10th edition], § 130; *Turner v. Turner*, 2 Reports in Chancery, 81, 154; see, also, comments on this case, 1 Story Eq., § 123; *Cooper v. Phibbs*, 15 Weekly Reporter, 1053; L. R. [2 H. L. Cas.], 149.) The case does not fall under the rule applicable to compromise of doubtful claims. (*Morey v. Town of Newfane*, 8 Barb., 645, 654; *Sherman v. Barnard*, 19 id., 291, 302; *Farmers' Bank v. Blair*, 44 id., 641, 652; *Russell v. Cook*, 3 Hill, 504, 506; *Lansdowne v. Lansdowne*, 2 Mosely, 364.) The maxim *ignorantia juris non excusat*, has no application, except to cases where there is a *wrong done* or a *right withheld*. (23 Am. J., 146, 166, 371, 412; 2 Alb. L. J., 405 *et seq.*; 3 id., 448 *et seq.*; 4 id., 7 *et seq.*; 6 id., 103 *et seq.*)

J. MacNaughton, for the respondent. *Ignorantia legis neminem excusat.* (*Bell v. Lumley*, 1 East, 38; *Brisbane v. Dacres*, 5 Taunt., 144; *East India Company v. Tritton*, 3 B. & Cr., 280; *Skying v. Greenwood*, 4 id., 128; *Branston v. Robbins*, 4 Bing., 11; *Shotwell v. Murray*, 1 Johns. Ch., 512-516; *Lyon v. Richmond*, 2 id., 51; reversed on another point in Court of Errors, see 47 N. Y., 60; *Storrs v. Booker*, 6 Johns. Ch., 681; 1 Pet., 15; *Bank of U. S. v. David*, 12 id., 32, 55, 56; *Clark v. Dutcher*, 9 Cow., 166; Story's Eq., § 138, and note; *Champlin v. Laytin*, 18 Wend., 497; 4 Den., 309; *N. Y. & H. R. R. v. Marsh*, 12 N. Y., 308; *Jacobs v. Morange*, 47 id., 58; *Pitcher v. Hennessey*, 48 id., 416-424; *Orchard v. Bininger*, 51 id., 652-654; *Marble v. Whitney*, 28 id., 308.) The surrender of the property by the plaintiff was the settlement and compromise of a claim made upon him by the defendant, and this alone is a sufficient consideration to support the defendant's title to the property. (*Palmer v. North*, 35 Barb., 282, opinion by BOOKES, J., citing 3 Hill, 404; 4 Den., 189; *Morey v. The Town of Newfane*, id., 309; *Russell v. Cook*, 3 Hill, 504; *Pickering v. Lane*, 2 Beavan, 31, 56.)

LEARNED, P. J.:

Whether there were one or two feather beds, was a question of fact. The schedule of articles demanded, mentions one. And it was that schedule which, it was admitted by the defendant, contained a list of the property taken. There was some evidence conflicting, but the finding of the referee should govern. It is not necessary to examine as to the mirror and three quilts. The plaintiff himself helped to do up the mirror when it was taken.

In the view I take of this case, it is unnecessary to decide whether, in the light of the decision in *Barnes v. Underwood*,* the plaintiff could maintain this action, without taking out letters of administration on his wife's estate.

I pass to another point. And here it is important to notice that neither party stood in any confidential relation to the other. The two met on equal footing, each knowing all the facts, except that the plaintiff did not know of the ante-nuptial agreement. If he

* 47 N. Y., 351.

had known this, he would have had knowledge of a fact tending to strengthen the defendant's rights, and to weaken his own. Nor was there any fraud or concealment, or want of due deliberation. The defendant claimed that he owned certain property in the plaintiff's possession. He stated this claim to the plaintiff. The plaintiff deliberated, took advice, and then, with a full knowledge of all the facts on which his own rights (whatever he had) rested, told the defendant to send for the property, and himself personally assisted in preparing for its removal. Can he now recover it, on the ground that he might then have successfully refused to surrender?

There is a sound rule that it is for the good of the State that there should be an end of litigation. And one application of that rule is, that when there is a disputed question between two persons, and they settle it voluntarily, without fraud, and with knowledge of the facts, the settlement should stand, although the courts would have settled it in a different way.

The plaintiff in this case knew that the property had come to his deceased wife from her father; he knew that she had had no children, and that he had married again. He might have felt that there was a natural propriety, under such circumstances, in returning the property to the father, from whom it came, and with whom he had no longer any connection. At any rate, whether he was influenced by this motive, or by some other, the delivery was in the fullest sense voluntary, intended to be a surrender of the property to one who claimed to be the owner.

But it is urged by the appellant that the plaintiff, at that time, thought that legally the father was entitled to the daughter's estate. Perhaps the plaintiff may have been so advised, under *Barnes v. Underwood*.*

In passing, we must notice that, if he had been guided by that case, he must have seen that the father could take only through distribution by the husband, as administrator; and that he, as husband, had the right of administration, and of possession as administrator, until he had fully administered. Following that decision, the plaintiff would have understood that it would only be when he, as administrator of his deceased wife, had settled the estate, that the defendant could claim, and then as distributee.

* 3 Lans., 526.

Assuming, however, that the plaintiff, on the facts, thought the defendant legally entitled, we are then brought to the rule, that ignorance of the law excuses no one. This is a correct and settled principle. "The rule that every man who has a full knowledge of the facts is presumed to understand his legal rights, is as much respected in courts of equity, as it is in law."* It cannot be necessary to go over the many cases which establish this rule. It is enough to refer to *Jacobs v. Morange*, † which involved a point similar to that in this case—that is, a reversal by the Court of Appeals of a decision of the inferior court, upon which the parties had acted. The court sustained the same doctrine, laid down by Chancellor KENT, in *Lyon v. Richmond*. ‡ "A subsequent decision of a higher court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect, and overturn such settlement."

This is not properly a question of estoppel. It is rather the same doctrine by which a party who has voluntarily settled with another a disputed claim, shall not be allowed to open that settlement, on the ground that he might have done better for himself. "Compromises are to be encouraged, because they promote peace, and when there is no fraud, and the parties meet on equal terms, and adjust their differences, the court will not overlook the compromise."§ Some cases cited by the appellant, are thought to be in conflict with these principles. In *Sanford v. Sanford*, ¶ the husband had lent money and taken a note to the order of himself and wife jointly. It was held that this was a gift to the wife, if it remained unpaid in the hands of the husband at his death, and she survived. When a committee of the husband's estate was appointed, she handed the note to the committee. That, of course, did not preclude her from claiming it after his death, for in his lifetime it was rightfully in his possession. Again, after his death she handed it to the appraisers of his estate, as a part thereof, and it was so inventoried. But the appraisers were not parties making a claim to the

* *Champlin v. Laytin*, 18 Wend., 407, per BRONSON, J., at 418, where may be found a review of the cases.

† 47 N. Y., 57.

‡ 2 Johns. Ch., 51, 60.

§ *Farmers' Bank v. Blair*, 44 Barb., 641.

¶ Court of Appeals, MS. (2d. time).

ownership of the note. She adjusted no controversy with them, and could have adjusted none. Neither of these transactions partake in the least of a claim to ownership, inconsistent with her title, and of a surrender in voluntary compliance with such claim.

Westerlo v. De Witt,* was a case where the plaintiff, a lady, having in her possession a piece of property which had belonged to the testatrix, consulted the defendant, who was the executor and also a lawyer; was advised by him that the property belonged to the estate, and therefore gave it up. The parties were not on an equal footing. The plaintiff did not act on her own opinion, or on that of independent counsel. She accepted the advice of the opposing claimant. By giving advice, he stood in a confidential relation to her. No such settlement of a dispute could stand if questioned.

The case of *Pitcher v. Plank-road Company*,† was where an infant made a compromise of a penalty to which it was claimed he was liable. An infant could not (except by consent of the court) legally compromise or settle a claim. Therefore that case is not in point.

There is not, so far as I see, any proof in the present case that there was a mistake of law or of fact. And certainly, if the plaintiff knew all of the facts, and understood their legal effect, he ought not to recover back property which he voluntarily gave up.

The judgment appealed from should be affirmed.

JAMES, J. (dissenting):

As I understand the rule of the common law, marriage was an absolute gift to the husband of the goods, chattels and personal property of which the wife was actually possessed at the time of the marriage, and of such as should come to her during coverture; the title vesting in him by marriage, he might use and dispose of the same as his individual property, and at his death it would go to his representatives, and not to his wife, if she survived.

The acts of 1848 and 1849 did not change the rule of the common law further than to suspend its operation during the life of the wife, allowing her to use or dispose of her property. They did not prevent the estate from vesting, or the husband's right to possession, subject to such suspension, so that at the wife's death so

*36 N. Y., 340.

†10 Barb., 486.

much as remained undisposed of was the husband's without any action on his part. In this case, and as to this property, the plaintiff, on the death of his wife, took absolutely as owner, under and by virtue of his marriage; and he was not required to perfect his title, possession or right to possession, by administration.*

I do not think this view is affected by the case of *Barnes v. Underwood*,† as this question was not in that case; the husband there having taken out letters, the contest was as to who was entitled to the estate. But if administration were necessary, it goes simply to the plaintiff's capacity to sue, and should have been taken advantage of by answer.‡ The counsel in no manner alluded to this question *in their argument*; the point was not insisted on, nor even *mentioned* in the respondent's brief; it does not go to the merits, and should therefore be deemed waived.§ But no matter what we think of this question, a new trial should be granted (unless we hold the voluntary delivery estops plaintiff), and he be allowed to recover for that portion of the property taken, which belonged to him and never to the wife. This property was not claimed, but was delivered with the other property.

I am not prepared to say that plaintiff should be barred by reason of this delivery, even conceding it a question of law. The delivery by plaintiff was in ignorance of his rights as to the property the wife received from her father. The referee finds that "the said property was *delivered* by the plaintiff *and received by the defendant as his property*, under the claim of title made thereto by the defendant, and *under no other consideration whatever*; and in his subsequent report he finds that "immediately before the delivery the plaintiff was *in possession*, was the *owner*, and held the legal title thereto." It appears, then, that plaintiff was the then owner, and surrendered the possession to the defendant, believing the *defendant* to be the owner, and in ignorance of any title in himself.

In the recent case of *Sanford v. Sanford*, in the Court of Appeals, not yet reported, where a note had been delivered to the

* See *Vallance v. Bausch*, 17 How. Pr., 348; *Ryder v. Hulse*, 24 N. Y., 373; *Ransom v. Nichols*, 22 id., 110.

† 47 N. Y., 351.

‡ Code, § 148.

§ 3 Wait's Pr., 224, 225, and cases there cited.

administrators as part of the assets, which legally belonged to plaintiff, the court said: "But it was proved on the last trial that these acts of plaintiff were done in ignorance of her rights to the note * * * hence, there is no foundation for an estoppel;" and she was permitted to recover. To hold this plaintiff estopped, for the reason stated, would be unjust. The defendant has got property to which he is not entitled, and the plaintiff has lost property to which he is clearly entitled. The cases cited under plaintiff's twelfth point, demonstrate quite satisfactorily that, in a case like this, this court, as a court of equity, has the power and ought to grant a new trial. In my judgment, the true rule in such cases is that laid down by Lord MANSFIELD, in *Bize v. Dickason*,* that is, "if a man has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back; but where money is paid under a mistake which there was no ground to claim in conscience, the party may recover it back." In this case, the mistake was mutual. The defendant, when he claimed the property, believed he was the owner. This view is the most favorable to him, for if, when he claimed and demanded the property, he knew it was plaintiff's, he would be guilty of a fraud in claiming and demanding it as his. The property then is plaintiff's, and the possession was surrendered to defendant through mutual mistake. The defendant conceded on the trial that he "*still retains*" the property, and the parties may therefore be restored to their original positions.

Where rights have been impaired through mutual mistake of the parties, and those rights can be restored without injury to either, and the rights of third parties do not intervene, a refusal to grant relief could rest on no sound principle. The doctrine of estoppel or mistake of law has no application.†

I think the judgment should be reversed and a new trial granted, costs to abide the event.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

* 1 T. R., 285.

† *Westerlo v. De Witt*, 36 N. Y., 340; *Sanford v. Sanford*, before cited; see, also, 2 Alb. Law J., 405 *et seq.*; 3 id., 448 *et seq.*; 4 id., 7 *et seq.*; 6 id., 108 *et seq.*; 28 Am. Jur., 146, 166, 371-412, where the cases are all reviewed.

AARON D. FENTON, PLAINTIFF, v. CHRISTOPHER S. ROBINSON, DEFENDANT.

Action on promissory note — fraud on maker — when constitutes a defense — Negligence.

This action was brought by a *bona fide* purchaser of a promissory note, which the maker claimed to have signed under the belief that it was a contract to act as agent for a patent cultivator. Upon the trial, evidence was given tending to prove that the note was signed by the defendant at his own house; that he and two of his sons, who were present, could read; that defendant attempted to read the paper, but did not understand it well, and that it was then read over by the person presenting the paper, who was an entire stranger to the defendant and his family, and signed by the defendant. *Held*, that it was proper to submit the question of defendant's negligence to the jury, and that a motion to direct a verdict in favor of the plaintiff was properly denied. (LEARNED, P. J., dissenting.)

THIS action was tried before the court and jury; the jury found a verdict for defendant. Upon plaintiff's motion, the court ordered as follows: "Exceptions having been taken to the verdict of the jury in this cause, on motion it is ordered that the plaintiff have sixty days to make a case and exceptions, to be heard in the first instance at the General Term," etc.

The action was brought to recover the amount of a promissory note, alleged to have been executed and delivered by the defendant to one Ingalls, dated July 3, 1872, for \$200, payable on or before the 1st day of June, 1873. Upon the trial, evidence was given tending to show that on the 3d of July, 1872, Ingalls, the payee of the note, drove up to defendant's house and wished to stay all night. That during the evening he exhibited to defendant a model of a cultivator and drill and seeder, and desired defendant to take an agency for the sale of the same in Hector township; and that the next morning the defendant was induced to sign a contract accepting the agency, and also an order for a machine; on the back of the order was a certificate of the amount of property owned by him. Duplicates, or purported duplicates, of these papers were made, so that the defendant was required to sign his name six times to papers then prepared by Ingalls. The defendant, quite an old man, is a farmer, not much accustomed to business outside of the routine of his farm duties. He started to read the papers, but

could not understand them. Ingalls read them all over to him, and then he signed them, believing that they were all right, creating no obligation whatever for the payment of money, except in the contingency in the contract provided. He was assured by Ingalls that the other three papers were exact copies or duplicates, and upon such assurance he signed them. If the defendant ever signed the note in question, he must have done so while signing the supposed duplicates. Not a word had been said about giving a note, or the payment of money. The defendant never signed any note to his knowledge, and never agreed so to do, and never intended to give any note, and if it is his signature to the note, it was procured without his knowledge. The defendant and two of his sons, who were present at the time of the signing the papers, could read.

The machines mentioned in the contract were never delivered, and it was conceded that the whole thing was a fraud, perpetrated by Ingalls upon the defendant; but it is claimed by the plaintiff, that as he is a holder of the note for value — a *bona fide* holder — he is entitled to recover, notwithstanding the facts testified to by the defendant.

T. D. Robinson, for the plaintiff.

W. H. Austin, for the defendant.

JAMES, J.:

In this case no judgment was pronounced on the verdict, none entered, and no appeal taken. The case comes here solely upon the order of the judge at the Circuit, upon a motion for a new trial, on a case and exceptions, under authority of section 265 of the Code; and if a new trial is denied, judgment on the verdict may be given in this court. The plaintiff is, therefore, confined to the exceptions taken at the trial.*

This action was upon a promissory note for \$200, payable to Ingalls or bearer, and had come to the plaintiff as a *bona fide* purchaser for value before maturity.

The defense was, that defendant never made or delivered the note; that the signature thereto, if made by the defendant, was

* *Siegel v. Schantz*, 2 N. Y. S. C., 353.

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obtained by fraud, and without defendant's knowledge that he was signing such a paper.

At the close of the trial, the plaintiff requested the court to direct a verdict in his favor for the amount of the note; the request was refused.

The case was then submitted to the jury, the court charging, "if defendant executed this note understanding that he was executing a promissory note—understanding that he was to execute a note to this agent in this business transaction—although he was induced to execute by fraud on the part of this agent, it would be no defense to this suit; but if defendant supposed, and believed, and understood at the time, that he was only signing a duplicate of an order for the delivery of machines, or a duplicate of a contract creating an agency for the sale of machines in the town of Hector, and did not understand, or suppose, or intend to sign any promissory note at all, and was guilty of no neglect on his part in this transaction, in signing the papers—or, in signing papers, he did not understand the real purport of them—then these facts, if found from the evidence in this case, are a legal defense to this note;" so that the distinct question of fact was put to the jury, "whether, if defendant did not intend to sign a note, or understand he was signing a note, and his signature was obtained by deception and without his knowledge, he was guilty of any negligence in signing under the circumstances as shown by the evidence." No objection was taken by the plaintiff to this charge, except to that portion wherein the court charged the jury, "that if defendant signed the note, not knowing it was a note, he was not liable." As no such charge appears in the case, nor anything like it, unless accompanied by qualifying or explanatory words, the exception is too indefinite and of no effect. The jury found for the defendant. Therefore, the only exception left in the case, is the exception to the refusal of the court to direct a verdict for the plaintiff at the close of the trial.

This case, in its facts, is very similar to that of *Chapman v. Rose*,* except that in this case, the question of negligence was submitted to the jury, and in that, its admission was refused. In *Chapman v. Rose*, the charge was, "that if the jury concluded, when Rose signed the orders, he did not intend to execute a note,

*44 How. Pr., 364; 9 Alb. Law Jour., 89.

as the transaction never called for one, it was not a note, and was never, at any time, valid in the hands of any party;" and the defendant had a verdict. The General Term sustained this ruling. In reversing it the Court of Appeals said: "It turns out that defendant signed a promissory note, and that it is now in the hands of a holder in good faith, for value. The question which arises on the branch of the charge now under consideration, is, whether it is enough, as against a *bona fide* holder, to show that defendant did not know or suppose he was signing a note, unless it also appears *that he was guilty of no laches or negligence* in signing the instrument. To that inquiry the attention of the judge at the trial was distinctly called, and the instruction which he gave, and which was excepted to, did not submit, but excluded the consideration of it from the jury." The case of *Foster v. Mackinnon*,* cited in support of the ruling, was an action upon an indorsement of a bill of exchange, and the court charged the jury, "that if the defendant signed it, not knowing it to be a bill, and believing it to be a guarantee, in consequence of a fraudulent representation as to its character, and if he was *not guilty of any negligence or laches* in signing it, he was not bound." The jury found for the defendant. Upon a review, and upon a full and able discussion, the court held the direction to be right.

Therefore, in this class of cases, I understand the rule to be, that when a negotiable promissory note is procured by fraud, deceit or mistake, the maker not having intended making a note, and it gets into the hands of a *bona fide* holder for value before maturity, showing such facts constitutes no defense, unless defendant can go further, and show and establish that, in putting his signature to the note, *he was not guilty of any negligence or laches*; if a party can establish all these facts, he cannot be charged with such an instrument any more than he can be with a note to which his name has been forged. In this case there was evidence upon the question of negligence: the defendant's age; his being unaccustomed to business outside his farm; his efforts to read the papers; inability to understand them; his having them read over to him, observing they were all right as read, and contained no agreement to pay money except as provided in the contract. This evidence, even

*L. R. (4 C. P.), 704.

though weak, was proper for the jury; it would have been error not to have submitted it, and therefore the court was right in its refusal to direct a verdict as requested.

Upon the motion before us we have no right to review the verdict; no right to examine the evidence further than necessary to determine whether the court was right in refusing to direct a verdict for the plaintiff.

Motion for a new trial denied, and judgment ordered for defendant on the verdict.

BOARDMAN, J. :

Concurring in brother LEARNED's views of the law, I still think the question of defendant's negligence was fairly submitted to the jury, and the judgment should be ordered for the defendant on the verdict, unless there is conclusive evidence of negligence on defendant's part. I think there was evidence tending to show that the defendant exercised care and prudence in ascertaining the contents of the paper signed by him. He endeavored to find out what he was signing, and supposed he had. It is true the evidence is not very strong or satisfactory, but it is evidence upon the subject, and it can rarely be a matter of law to determine the dividing line between necessary care on the one hand, and negligence on the other. Believing that there is some evidence to sustain the verdict of the jury, I am disposed to concur in the opinion of brother JAMES.

LEARNED, P. J. (dissenting):

I think that the court should have directed a verdict for the plaintiff. It was admitted that the plaintiff was a *bona fide* holder for value.

The syllabus of *Chapman v. Rose*,* is, that "where one having the opportunity and the power to ascertain with certainty the exact obligation he is assuming, yet chooses to rely on the statements of the person with whom he is dealing, and executes a negotiable instrument without reading or examination; as against a *bona fide* holder for value, he is bound by his act. To avoid liability he must show that he was guilty of no laches or negligence in signing." In that

* 56 N. Y. 187.

case the court say that "meaning to make an obligation in writing, and which was put in writing that it might of itself import the fact and the form and the measure of the obligation, he trusted to another to fix that form and measure, without exercising that supervision which was in his power, and by which perfect protection was possible. In such case the rule is that he is bound by the act of him who has been trusted, in favor of a holder in good faith."

That case is almost identical with the present. Ingalls, a stranger, came to the defendant's house and made some bargain with him about a cultivator patent right. The defendant had a wife and five children in his family. He could read and two of his sons could read. He did read one of the papers; that which was delivered to him. Ingalls said the other was just like it, and the defendant signed it without reading, and without having his family read it. Thus the defendant had the opportunity and power to ascertain with certainty the exact obligation he was signing. He could have read it, or he could have had his sons read it. Instead of doing this he trusted to the statements not of an indifferent person but of the person with whom he was dealing; and that person was an utter stranger. Can it be said that he was guilty of no negligence?

It is not a question of degree of negligence; it is a question whether there was any negligence. If there was, the defendant cannot shield himself from liability on his note. By signing the note he enabled Ingalls, or some one else, to obtain the money of the plaintiff, an innocent person. To escape from liability on the note, he must show that he was guilty of no negligence or laches.

We must remember that negligence is not the ground of action. Want of negligence is the alleged ground of defense.

Now the defendant did not read the paper which he signed and gave to Ingalls; he had the power to read it, and the opportunity; he could have caused it to be read to him by those on whom he might reasonably rely; he did not do this; he trusted a man whose interests were adverse to his own, and no reason is shown why he should have thus trusted. The facts were undisputed. I think they did not warrant the submission to the jury of the question whether the defendant was free from laches or negligence.

Motion for new trial denied.

MEMORANDA

OF

CASES NOT REPORTED IN FULL.

HENRY C. KING AND ANOTHER, APPELLANTS, v. MICHAEL GALVIN, RESPONDENT.

Estoppel — election of remedies — when party bound by.

This action was brought to recover the value of certain property belonging to the plaintiff, taken by the defendant, a judgment creditor of one Phillips, on an execution issued against him, as being his property. After the commencement of this action Phillips was declared a bankrupt, and his assignee sued the plaintiffs for property of Phillips fraudulently purchased of him by them, and recovered judgment against them therefor. In this proceeding plaintiffs claimed and were allowed to deduct from such claim against them, whatever the sheriff, by virtue of the execution against Phillips, had taken from them, such deduction including the property sought to be recovered in this action. *Held*, that the plaintiffs, having been allowed the value of the property taken by the defendant in the suit brought by the assignee of Phillips, could not now deny that such property belonged to him; and that this action could not be maintained.

APPEAL from a judgment in favor of the defendant, entered upon a verdict directed by the court, and from an order denying a motion for a new trial, made upon the judge's minutes.

J. M. Carroll, for the appellants.

J. E. Dewey, for the respondent.

Opinions by LEARNED, P. J., and JAMES, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented.

Judgment and order affirmed.

DAVID A. BANKER, APPELLANT, v. ELLEN M. BANKER,
RESPONDENT.*New trial in equity cause — when not granted.*

Although courts of equity may and will, in proper cases, grant a new trial in a suit in which the judgment binds the plaintiff as to his inheritance, in analogy to the statutory right of a defeated party in an action of ejectment, yet such rule does not apply to an action brought by an heir at law against the widow of his deceased father to have the marriage declared void on account of the lunacy of the father at the time of the marriage, as a judgment therein sustaining the marriage does not defeat the plaintiff's right as heir, but at most merely suspends his possession of a portion of the estate for the life of the defendant.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court at Special Term.

James Lansing, for the appellant.

R. A. Parmenter, for the respondent.

Opinion by JAMES, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

PATRICK QUINN, PLAINTIFF, v. WALTER CARR AND
OTHERS, DEFENDANTS.*Contracts of agent — when principal not bound by.*

The defendants, who were commission merchants in the city of New York, employed one Carr as their agent at Norwich, New York, to solicit, obtain, and ship to them produce to be sold on commission. The plaintiff delivered to Carr a quantity of butter to be shipped to defendants and sold on commission, upon the guarantee of said Carr that it would bring thirty to thirty-three cents per pound, less commission. The defendant had no knowledge of the guarantee, and had never given Carr any specific authority to bind them by such a guarantee. No evidence was given of any similar act of Carr. The butter having been sold for less than the price guaranteed, this action was brought to recover the difference. *Held*, that Carr had no authority, either real or apparent, to make the contract, and that defendants were not liable thereon.

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MOTION for a new trial upon exceptions ordered to be heard in the first instance at the General Term, after a verdict for the plaintiff at the Circuit.

E. H. Prindle, for the plaintiff.

E. B. Thomas, for the defendants.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Motion for new trial granted, costs to abide the event.

FRANKLIN E. CLEMONS, RESPONDENT, v. WASHINGTON
DAVIS, APPELLANT.

False imprisonment — Special damages — when must be alleged — Amendments — when allowed.

This action was brought to recover damages for the false imprisonment of the plaintiff by the defendant. Upon the trial, the plaintiff was allowed to prove the effect of his arrest upon his business, although no special damages were alleged in the complaint. *Held*, that the judgment would not be reversed for this error; that as special damages do not constitute a distinct cause of action, but only tend to increase the recovery, that the complaint could be amended at the trial by adding the necessary allegations, and that the General Term would, in furtherance of justice, consider it so amended.*

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

J. L. Baker, for the appellant.

King & Montgomery, for the respondent.

Opinions by LEARNED, P. J., and JAMES, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented.

Judgment affirmed.

* *Van Ness v. Bush*, 14 Abb., 33; *Bowdoin v. Colman*, 6 Duer, 183; *Bate v. Graham*, 11 N. Y., 287.

**RENSSELAER R. MOORE, RESPONDENT, v. JOHN
McCARTHY, APPELLANT.***Lease — extension of — surrender.*

This action was brought to recover rent, alleged to be due upon a sealed lease, whereby the defendant leased of the plaintiff certain premises for the term of three years from January 1, 1869, with the privilege of three years more, after the termination of the first term. The defendant entered and occupied the premises for fifteen months; he then, having paid the rent to that date, left the premises, one Kinny being in possession with plaintiff's knowledge. Kinny continued to occupy, paying rent to the plaintiff, till May 8, 1872, when he left, delivering the key to the plaintiff, who accepted it and subsequently rented a portion of the premises. *Held* (1), that the holding over of Kinny did not constitute an election on the part of the defendant to extend the term; (2), that accepting the key and re-renting the premises was a surrender and termination of the lease, at least from the time of the re-renting, if not from the time of accepting the key.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

Churchill & Nutting, for the appellant.

Waters & Sands, for the respondent.

Opinion by JAMES, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed and new trial ordered, costs to abide the event.

**EDMUND KELLY, RESPONDENT, v. THE FALL BROOK COAL
COMPANY, APPELLANT.***Principal — when bound by contracts of agent.*

An agent who is accustomed to make contracts for his principal, with the principal's knowledge, may bind the principal by his contracts, although the instructions of the agent are not to contract without his principal's knowledge.

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was brought to recover damages for an alleged breach of a contract, claimed by the plaintiff to have been made between him and the defendant about June 7, 1873. The plaintiff alleges an agreement by defendant "to load his vessel and furnish a cargo from the office of defendant, at Watkins, in the county of Schuyler, to some point east, in turn with the defendant's boats, and in that way give full cargoes and employment for the plaintiff's boat and its master and crew during the said season," and alleges, as a breach, that his boat was not loaded in turn, but was kept idle, and claims damages for such breach.

Hurd & Fletcher, for the appellant.

William Lounsbury, for the respondent.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

MARTIN COLE, RESPONDENT, v. MATTHEW VAN
KEUREN, APPELLANT.

1 R. S., 501, § 1, sub. 3 — order of commissioners as to a public highway — effect of.

When the commissioners of highways of a town meet, and, it appearing to them that a certain road has been used as a highway for more than twenty years, order it to be ascertained and recorded, such order is not conclusive upon a person claiming that the said highway is a private road, and that he is the owner of the soil thereof. The statute (1 R. S., 501, § 1, sub. 3), does not authorize the commissioners to create or enlarge, but only to perpetuate, the evidence of a public right; the fact of dedication depends on the user.*

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

* *People v. Judges of Cortland Co.*, 24 Wend., 491; *Talmage v. Hunting*, 89 Barb., 654; affirmed 29 N. Y., 447.

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S. L. Stebbins, for the appellant.

William Lounsbury, for the respondent.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented.

Judgment affirmed.

CAROLINE E. PATRICK AND ANOTHER, COMMITTEE, ETC.,
RESPONDENTS, v. THE EXCELSIOR LIFE INSURANCE
COMPANY, APPELLANT.

Policy of insurance — when not invalidated by suicide of insured.

In an action upon a policy of insurance taken out upon the life of a husband for the benefit of his wife, the suicide of the insured is not a defense where there is no stipulation to that effect in the policy.

Fitch v. American Popular Life Ins. Co. (11 Alb. Law Jour., 91) followed.

The expression, in a policy of life insurance, "in the known violation of the law of any State," cannot be construed to include suicide.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the judge's minutes.

Elliott F. Shepard, for the appellant.

Henry Smith and *John R. Putnam*, for the respondents.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment and order affirmed.

EDWARD K. TOWNSEND, APPELLANT, v. DAVID M.
BRUNDAGE, RESPONDENT.

Trespass — property damaged by — how value of determined.

Upon the trial of an action brought by the plaintiff to recover the damages occasioned by cattle of the defendant entering on his land, and destroying his grass and apples, a witness was asked: "To the best of your knowledge, were there 100 bushels of apples there?" *Held*, that the question was proper, and that it was not objectionable as calling for the opinion of the witness.

Morehouse v. Matthews (3 N. Y., 515), *Armstrong v. Smith* (44 Barb., 120) distinguished.

APPEAL from a judgment of the County Court of Sullivan county, reversing a judgment in favor of the plaintiff, recovered in a Justice's Court.

Groo & Wiggins, for the appellant.

R. J. Jelliff, for the respondent.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment of the County Court reversed, and that of the justice affirmed, with costs.

ANTHONY H. BLAIDSELL, APPELLANT, v. DANIEL
WHITEFORD, RESPONDENT.

THE SAME v. FLETCHER B. STORY, RESPONDENT.

THE SAME v. JOHN G. WILLIAMSON, RESPONDENT.

THE SAME v. HANNAH EDGET, RESPONDENT.

Summons — form of notice — Code, § 129, sub. 2.

An action to recover rent upon a lease by the terms of which the rent is to be paid in wheat, is not an action arising on contract for the recovery of money only, and the summons should contain the notice required by subdivision 2 of section 129 of the Code.

APPEALS from orders made in the above entitled actions, striking out the complaint in each, unless the plaintiff should amend the summons so that the notice should be under the first instead of under the second subdivision of section 129 of the Code.

Matthew Hale, for the appellant.

J. A. Griswold, for the respondents.

Opinion by BOARDMAN, J.

Order reversed with ten dollars costs in first case, and with expenses of printing in all, and motion denied with ten dollars costs in each case.

JOHN McDONNELL AND ANOTHER, RESPONDENTS, v. WALTER
BAUENDAHL AND OTHERS, APPELLANTS.

Assignment by bankrupt — effect of.

One Lee, after he had been declared a bankrupt, assigned to the plaintiffs the claim against the defendants upon which this action was brought; no assignee in bankruptcy was ever appointed, and the proceedings were subsequently discontinued. *Held*, that the assignment was valid.

APPEAL from a judgment in favor of the plaintiffs, entered upon the report of a referee.

I. S. & C. H. Smith, for the appellants.

F. Fish, for the respondents.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

CORRAN P. STANTON, RESPONDENT, v. ALBERT N. PRITCHARD, APPELLANT.

Cutting timber — measure of damages.

In an action for cutting and removing standing timber, the measure of damages is the value of the timber at the place where it stood when the trespass was committed, unless the action is brought and a recovery had under the statute (2 R. S., 338, § 1), when the damages may be trebled.*

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

Isaac S. Newton, for the appellant.

E. H. Prindle, for the respondent.

Opinion by JAMES, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

ELIJAH BEATTY, RESPONDENT, v. AUGUSTUS MYERS, APPELLANT.*County Court — appeal from.*

Where an action is commenced in a County Court, an appeal may be taken from a judgment entered therein, upon a case and exceptions, without first moving in such court for a new trial.

APPEAL from a judgment of the County Court of Ulster county, in favor of the plaintiff, entered upon the verdict of a jury.

Charles A. Fowler, for the appellant.

A. S. Schoonmaker, for the respondent.

Opinion by JAMES, J.

* *Whitbeck v. N. Y. C. R. R. Co.*, 36 Barb., 644.

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Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

ALFRED SWART, RESPONDENT, v. ROBERT S. LIVINGSTON,
APPELLANT.

Agency — statement of alleged agent to third person — effect of its admission in evidence.

APPEAL from a judgment of the County Court of Columbia county in favor of the plaintiff for \$186.18 damages and costs, and from an order denying a motion for a new trial.

The only point raised in this case was on the objection to a question put to one Crawford, whether he told the plaintiff, when he hired him, that he hired him for the defendant. The court *held*, that the admissibility of that evidence depended on Crawford's authority from the defendant; that is, it depended on his agency. If Crawford was defendant's agent to hire the plaintiff, then what he said in hiring was admissible as part of the *res gestæ*; otherwise not. That Crawford's agency was a question of fact on which the evidence was conflicting. The defendant might have asked the court to instruct the jury, that if Crawford was not otherwise shown to be the defendant's agent to do this hiring, then the statement made by him at the time would have no weight; but no such request was made. The court *held*, that it could not say as matter of law that Crawford was not the defendant's agent, for the jury must have found that he was; and, therefore, it could not say that there was error.

The judgment and order were affirmed.

J. B. Longley, for the appellant.

R. E. Andrews, for the respondent.

Opinion by the court.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ

Judgment and order affirmed.

THE OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY, APPELLANT, v. VERMONT AND CANADA RAILROAD COMPANY AND OTHERS, RESPONDENTS.

MOTION to dismiss an appeal from a judgment, entered on a demurrer to the plaintiff's complaint.

This action was brought to obtain a decision from the court, whether a certain lease executed by the plaintiff to the Vermont and Canada Railroad Company was or was not void. The plaintiff did not affirmatively allege that the lease was void, but it asked for a decision on this point and a judgment that, if void, it be annulled and they restored to their rights as before the lease was executed. The defendant, the Vermont and Canada Railroad Company, demurred. The demurrer was sustained.

The Vermont and Canada Railroad Company moved to dismiss this appeal, on the ground that before and since the judgment on the demurrer, the plaintiff accepted rent on the lease, and thus ratified it.

The ground on which it is claimed that the lease is void, is, that it was one which the company had no power to make — *ultra vires*. The General Term was of opinion that if the Ogdensburgh and Lake Champlain Railroad Company had no power to make such a lease as the one in question, they had no power to ratify it by accepting rent.

L. Hasbrouck, Jr., and *Wm. M. Evarts*, for the appellant.

Edward C. James, for the respondents.

Opinion by LEARNED, P. J.

Present -- LEARNED, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented.

The motion to dismiss the appeal denied, with ten dollars costs.

GEORGE P. KIRK, RESPONDENT, v. H. WILSON
BLASHFIELD, APPELLANT.

*Judgment in Justice's Court dismissing action on the ground of a want of jurisdiction—
Res adjudicata—costs in such case on recovery of less than fifty dollars in action in
Supreme Court.*

APPEAL from a judgment in the Supreme Court, entered in favor of the plaintiff.

The plaintiff commenced an action in a Justice's Court. The defendant objected to the jurisdiction, on the ground that the accounts between the parties exceeded \$400. The justice, after first overruling the objection, finally dismissed the action upon that same ground. The plaintiff then sued in this court and recovered \$38.50. On a motion at Special Term he was allowed costs.

It was admitted that the justice was in error in his decision, but no appeal was taken from it. The General Term *held*, that if an appeal had been taken, and thereupon the same decision had been made in this court, that the matter would have been *res adjudicata*; and that as the plaintiff rested satisfied with the decision which was made by the justice, and as that was made on the defendant's objection, it must be taken as the settled rule of this present case.

The court also examined the question raised as to this order, and *held*, that as a matter of practice the defendant should have appealed from the order of the Special Term granting the plaintiff costs, and not from the judgment; and that this case should not be considered a precedent as to the manner of reviewing such orders.

A. J. Parker and *O. Porter*, for the appellant.

B. A. Benedict, for the respondent.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

CALVIN L. HATHAWAY, APPELLANT, v. EDWIN W.
HOWELL, RESPONDENT.

Execution — issued before entry of judgment.

APPEAL from a judgment in favor of defendant, entered on the report of a referee.

This was an action to recover the possession of certain hotel furniture, of the value of \$10,000.

The case was once before tried, and the defendant had judgment, which was affirmed at the General Term, but reversed by the Commission of Appeals.*

The defendant, as sheriff of Chemung county, justified taking and holding the property under and by virtue of an execution against one Slater, dated May 26, 1866, reciting a judgment of that date as the basis for its issue. It was shown that papers were prepared for obtaining a judgment, by confession, on Saturday evening, May twenty-sixth, and left in the clerk's office to be entered up after hours, but was not and could not be perfected until eight o'clock, Monday the twenty-eighth. This execution was issued and delivered to the sheriff on May twenty-sixth, with directions to levy, and a levy was made on that day. On the former appeal, the Commission held † that an execution did not vest any right or title to the execution debtor's property in the sheriff until actual levy made; and that a levy must be made during the life of the execution; that the execution was void; and that no title was acquired by the sheriff by his levy on the twenty-sixth. That the judgment against Slater did not become perfected until eight A. M., on the twenty-eighth, and no levy was shown to have been made after that date within the life of the execution.

On the second trial, the defendant undertook to show that a new levy was made with this execution after eight o'clock on Monday, the twenty-eighth.

The question passed on by the General Term was the sufficiency of the evidence on the second trial to establish a levy on May twenty-eighth. The court was of opinion that that fact was not

* 54 N. Y., 97.

† 54 N. Y., 102.

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shown by the evidence, and reversed the judgment, granting a new trial, costs to abide the event.

Milo Goodrich, for the appellant.

S. B. Tomlinson, for the respondent.

Opinion by JAMES, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed, and new trial granted, costs to abide event.

ELAM LOOMIS, RESPONDENT, v. LEROY MOWRY AND
OTHERS, APPELLANTS.

Search for written instrument — necessary to enable party to give parol proof of its contents — cross-examination of witness.

THIS action was brought to recover damages for the alleged conversion of a note. The complaint charged that in September, 1870, the plaintiff made a note for \$534, payable to one Sanborn, who is alleged to have indorsed it. It is then alleged that the note was received by the defendants upon the agreement that it should be returned to the plaintiff before maturity; that it matured December 4, 1870; that the defendants did not return it, but before maturity sold and converted it.

The question on this appeal is raised by exceptions taken to refusals of the court below to allow a cross-examination of a witness upon the question whether he had made proper search for a written instrument, as to the contents of which parol evidence was given on the trial. The court at General Term *held*, that such refusal was error, and reversed the judgment and granted a new trial, costs to abide the event.

U. G. Paris, for the appellants.

Hughes & Northrup, for the respondent.

Opinion by JAMES, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed and new trial granted, costs to abide event.

WILLIAM P. BAKEN, SURVIVOR, ETC., APPELLANT, v. EUNICE C. HARDER, RESPONDENT.

Married woman—charging separate estate.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

Upon a former appeal in this action from a judgment in favor of the plaintiff, the judgment was reversed, upon the ground that the plaintiff's claim was for the benefit and advantage of defendant's husband, and in no respect for the benefit of her separate estate, and that she had not charged her separate estate with the payment of the debt. Upon this appeal the General Term were of the opinion that the cases of *Maxon v. Scott*,* and *Kelty v. Long*,† were not in conflict with the former decision of the court in this case, and, as the facts upon which it was presented were substantially the same, affirmed the judgment.

D. Magone, Jr., for the appellant.

Vary & Stone, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented.

Judgment affirmed, with costs.

SARAH M. COOK, RESPONDENT, v. THE UNITED STATES EXPRESS COMPANY, APPELLANT.

APPEAL from a judgment of the County Court of Tompkins county, in favor of the plaintiff, entered on the verdict of a jury, and from an order of this court, denying a new trial, upon a motion certified into this court.

This action was brought to recover the value of certain articles

*55 N. Y., 247.

†8 S. C. (1 Hun), 714; S. C., 4 N. Y. S. C., 163.

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claimed to have been taken from a trunk of the plaintiff while in the possession of the defendant. The judgment was reversed on the ground that the plaintiff was allowed to testify to statements made to her by a man at a depot, to the effect that he was an agent of the company, which in fact he was not, and also on the ground that the verdict was against the weight of evidence.

Marcus Lyon, for the appellant.

John A. Williams, for the respondent.

Opinion by JAMES J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed and new trial granted, costs to abide the event.

HORACE KELLOGG AND ANOTHER, RESPONDENTS, v. GEORGE WITHERHEAD, APPELLANT.

Statute of frauds.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought to recover the price of a quantity of hams alleged to have been sold to the defendant by the plaintiffs. The General Term held (following *Bates v. Coster*, 8 S. C. [1 Hun], 400), that the agreement between the parties constituted a contract for the sale of the hams, and not one for work and labor to be performed upon them; and that, as the requirement of the statute of frauds had not been complied with, the contract was void, and could not be enforced.

Magone & Holbrook, for the appellant.

L. M. & L. K. Soper, for the respondents.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., and BOARDMAN, J.

Judgment reversed, and new trial ordered, costs to abide the event.

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ABRAHAM HOFFMAN AND ANOTHER, RESPONDENTS, v. THE UNION FERRY COMPANY OF BROOKLYN, APPELLANT.

APPEAL from a judgment entered on a verdict at the Montgomery Circuit, and from an order denying a motion for a new trial.

The action was brought to recover damages sustained by the plaintiff's canal boat, Milton Hoag, in a collision with the defendant's steam ferry boat, Baltic. On a former trial the complaint was dismissed, and, on appeal to the Court of Appeals, the judgment at the Circuit was reversed, and a new trial was ordered. On this appeal from the judgment entered on the new trial, the General Term was of opinion that the judge at the Circuit had followed the ruling of the Court of Appeals,* and affirmed the judgment and order appealed from.

Charles Mason, for the appellant.

Henry Smith, for the respondents.

Opinions by LEARNED, P. J., and JAMES, J.

JAMES, J., dissented on the ground that the verdict was against the weight of evidence, and that the court erred in its charge.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment and order affirmed.

ROBERT F. SILLIMAN AND OTHERS, RESPONDENTS, v. BENAJAH TYRRELL, SUED WITH OTHERS, APPELLANT.

APPEAL from a judgment for plaintiffs, entered on a verdict directed by the court.

This action was brought upon a promissory note, and the defense set up was, that a new note had been given in payment and satisfaction of the one sued upon.

* 47 N. Y., 176.

The court below directed a verdict for the plaintiff, and this court, on a review of the facts in the case, affirmed the judgment entered on such verdict.

Francis A. Smith, for the appellant.

U. G. Paris, for the respondents.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., and BOARDMAN, J.

Judgment affirmed.

JOHN W. BURR, RESPONDENT, v. AGRICULTURAL INSURANCE COMPANY, APPELLANT.

Principal and agent.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict rendered at the Tompkins county Circuit. The action was brought to recover loss sustained by plaintiff, and covered by a parol contract of insurance, alleged to have been made with plaintiff by defendant's agent. The court, after a review of the case, concluded that the jury must have inferred from the instructions in the charge of the court, that a principal must be held to have conferred and to be bound by whatever power an agent may assume to have or to exercise, and that, though there may be cases when such instructions would be proper, this was not such a case.

Starbuck & Sawyer, for the appellant.

M. Goodrich, for the respondent.

Opinion by POTTER, J.

Present — LEARNED, P. J., BOARDMAN and POTTER, JJ.

Judgment reversed and new trial granted, costs to abide the event.

CHARLES WENTZLER, RESPONDENT, v. SOLOMON
ALDRICH, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee. The General Term was of the opinion that the evidence in this case was sufficient to sustain the findings of the referee, and affirmed the judgment.

Edward K. Clark, for the appellant.

R. H. Root, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

LUCIUS E. GREEN AND ANOTHER, PLAINTIFFS, v. PERRY N.
ELDRED, DEFENDANT.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict directed for the plaintiff. The only question presented upon this appeal was as to the proper construction to be given to a deed under which the plaintiff claimed. The General Term was of the opinion that the deed was properly construed by the judge at the Circuit, and ordered judgment for the plaintiff.

Martin I. Townsend, for the defendant.

Esek Cowen, for the plaintiffs.

Opinion by BOARDMAN, J.

Present — BOARDMAN and JAMES, JJ.

New trial denied, and judgment ordered for the plaintiff, with costs.

JOHN S. SLINGERLAND, RESPONDENT, *v.* ERASMUS
BENNETT, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

The General Term *held* that the evidence in the case was sufficient to sustain the verdict of the jury, and affirmed the judgment.

J. H. Clute, for the appellant.

A. J. Parker, for the respondent.

Opinion by BOARDMAN J.

Present — BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs

LEAH J. INGERSOLL, ADMINISTRATRIX, ETC., APPELLANT, *v.*
THE NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY, RESPONDENT.

APPEAL from an order of the Special Term, granting a new trial after verdict for the plaintiff. The action was to recover damages caused by the defendant's running over and killing plaintiff's intestate. The answer set up a special denial and contributory negligence on the part of the intestate.

The General Term was of opinion that the evidence in the case made it proper to submit the cause to the jury and that its decision thereon was conclusive.

W. L. Van Denbergh, for the appellant.

S. S. Jackson, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., and BOARDMAN, J.

Order reversed, with costs.

Cases

DETERMINED IN THE

FOURTH DEPARTMENT

AT

GENERAL TERM,

April, 1875.

JAMES S. MARSH, RESPONDENT, *v.* JOHN A. DODGE AND
OTHERS, APPELLANTS.

Patent — licensee of — when cannot set up invalidity of patent.

The defendants agreed to pay to the plaintiff, the owner of a patent for the manufacture of rakes, ten dollars for each rake that should be made or sold, or disposed of by them, or by their authority or procurement; subsequently they sold to an incorporated company all their partnership effects, including all the rakes remaining unsold, and a number then in process of manufacture. *Held*, that the defendants were chargeable with the royalty upon each of the unfinished rakes so transferred.

A licensee must notify the owner of the patent of his renunciation of the license, before he can repudiate his obligations under it.

Upon the trial defendants objected to the admission in evidence of the patent, on the ground that it was not properly authenticated. *Held*, that proof of the patent was unnecessary, as the defendants were estopped from denying either its existence or validity.*

Motion for a new trial on exceptions ordered to be heard in the first instance at the General Term, after judgment entered in favor of the plaintiff upon the verdict of a jury.

This case has already been before the General Term, and is reported in 5 Lansing, 541.

* See *Hawks v. Swett*, *ante*, p. 7.

The complaint alleged that before and during the years 1865 and 1866, the said plaintiff was the owner as patentee of certain letters patent of the United States, securing certain improvements in harvesting machines, commonly known as "Marsh's self-rake." That on or about the 2d day of September, 1865, the said plaintiff, being such owner as aforesaid of said patented improvements in said letters patent specified and set forth, and the said defendants, by their said firm name of "Dodge, Stevenson & Co.," executed in duplicate, and by delivery interchanged the license, in and by which the said plaintiff licensed to the said defendants, as such copartners as aforesaid, the right and privilege within certain territories therein set forth, of making, using, and vending to others to be used, the improvements in said letters patent specified; in consideration whereof the said defendants, as such copartners, thereby agreed to pay to said plaintiff a royalty or patent fee of ten dollars for each and every Marsh's self-rake that should be made and sold or disposed of by the said defendants, or by their authority or procurement, during the existence of said patents. That since the execution of said license, the said defendants have not rendered a true and faithful, or any, account of the said self-rakes made by them or by their authority or procurement, or paid the fees stipulated in said license.

The defendants, in their answer, alleged that on or about the 2d day of September, 1865, they intending to manufacture rakes of a certain construction, form and kind, to be attached to and sold with certain reaping machines which said defendants were then manufacturing, the said plaintiff, for the purpose and with intent of inducing the defendants to make and enter into the contract or license set forth in said complaint, and with the intent to cheat and defraud the defendants, falsely and fraudulently represented and stated to the defendants that he held and possessed certain letters patent which secured to him, the said plaintiff, the sole and exclusive right and title to manufacture, use and vend said rakes of the construction and kind defendants then proposed to make and vend, and that such patent rights therefor were in all respects good and valid patents; that his said patents embraced and included the entire, sole and exclusive right to make, use and vend all self-rakes to be, or which could be attached to any reaping machine; and

that the said self-rake, with all the rights of the invention thereof, and the right to use or make or vend the same in the particular form, manner and material then proposed to be made and sold by defendants, were all embraced in his said patents, and belonged to him. That the defendants, relying upon said representations and statements, made and entered into the contract or license named in the said complaint, and accepted the same. And defendants alleged, that in truth and fact, the said plaintiff did not own or possess any letters patent which secured to him the sole or exclusive right or title to make, use or vend said self-rake, or any self-rake of the structure or kind the defendants then proposed to make, use and vend, and such patent rights therefor were not good, or valid, or genuine, nor were they the inventions of the plaintiff, nor did his patent right embrace or include the entire, or sole, or exclusive right to make, use or vend any or all self-rakes to be, or which could be attached to any reaping machine.

Rollin Tracey, for the plaintiff.

H. V. Howland, for the defendants.

GILBERT, J.:

This action was brought to recover a royalty accruing upon the manufacture and sale of patented rakes, under an agreement made by the defendants as copartners with the patentee, who is the plaintiff. The agreement is in writing, under the hands and seals of the plaintiff and defendants respectively. It contains a recital of the fact that the letters patent had been issued to the plaintiff, and an agreement on the part of the defendants to pay the plaintiff ten dollars upon each of the rakes that should be made or sold, or disposed of by them, or by their authority or procurement, during the period for which the license continued. The plaintiff's claim was limited by the complaint to rakes manufactured prior to January 1, 1867. It appeared that the defendants had ceased to manufacture rakes after March 10, 1866, and had been succeeded in that business by an incorporated company, to which they had sold and transferred all their partnership effects, including all the rakes manufactured by them prior to that time, and remaining unsold,

and including also a large number of rakes in process of manufacture. It appeared, also, that the defendants, before the transfer to the company, had sent some of the completed rakes to their agents in various parts of the country to be sold, and that purchasers from such agents had the privilege of returning the rakes bought, if they should not be suited by them.

Much of the time spent in the trial was devoted to the examination of witnesses upon the question, whether the rakes actually manufactured were in all respects such as were specified in the plaintiff's patents. This inquiry ought to have been excluded, because the defense which that kind of evidence tended to establish had not been pleaded. It was, however, indulged by the court, without objection, and the questions arising upon it were fairly and correctly submitted to the jury. In the course of this inquiry, the defendants offered in evidence a patent granted to the defendant Dodge, bearing date August 20, 1867, for a rake similar to that invented by the plaintiff. It was excluded, and the defendant excepted. We think this exception, as well as those taken to the judge's charge on the subject involved in this evidence, were unavailing for this reason, if for no other, namely, that the evidence was not material to the issue, and, in respect to the rejection of Mr. Dodge's patent, the plaintiff's claim did not embrace rakes that were manufactured after that patent was issued, so that, in any point of view, the evidence was irrelevant. Moreover, the defendants were estopped to deny that the rakes manufactured were made under the plaintiff's license, so long as they retained the license itself. They were at liberty to relinquish it at any time, and they were bound to do so, if they intended to deprive the plaintiff of his royalty. Good faith requires that a licensee shall give to the owner of the patent notice of his renunciation of the license, so that the privilege may be sold to others, before he can be permitted to repudiate his obligations under it.

The agreement of the plaintiff to give a drawback of three dollars, was not admissible in evidence. It was not a part of the license, although it was made on the same day, but it referred to another and independent transaction. If the defendants wished to avail themselves of that agreement, they should have pleaded it,

and have set up their counter-claim under it. Not having done so, it was not available to them as a defense.*

An exception was taken by the defendants to the admission of the plaintiff's patents in evidence, on the ground that they were not properly authenticated. We are inclined to think this exception was not good, but we do not deem it worth while to discuss the subject, for the reason that proof of the patents was not necessary. We think the defendants were estopped to deny either the existence or the validity of the patents. They had under the license all that they bargained for. They cannot, therefore, be permitted to say that the rakes which they made or caused to be made, were not made under the license, because the plaintiff had not the patents recited in it, or because such patents were invalid, any more than a tenant can deny that he occupied under the lease which he took from his landlord.† Many other exceptions were taken by the appellants to the admission and rejection of evidence. We have examined all of them, and found no error.

In submitting the case to the jury, the court restricted the liability of the defendants to the number of rakes actually manufactured by them in conformity with the improvement specified in the plaintiff's patents, and which had been actually sold. But he treated the transfer of the defendants to the corporation as a sale of the completed rakes to them, and the sale by the corporation of the unfinished rakes, transferred to them by the defendants, and which the corporation afterward finished and sold on their own account, as a sale made by the authority or procurement of the defendants, within the terms of the license. We think that principle is correct. The sale to the corporation was something more than a mere transfer of the materials of which the rakes were composed. It gave to the rakes a quality of vendibility, which they would not otherwise have possessed in the hands of the corporation. Both the corporation and the defendants must have intended that the former should acquire the right to sell them, without becoming liable to the plaintiff for an infringement of his patents.

* Code, § 149, 150, and Wait's notes.

† Lawes v. Purser, 8 El. & Bl., 930; Baird v. Neilson, 8 Cl. & Fin., 726; Noton v. Brooks, 7 H. & N., 499; Crossley v. Dixon, 10 H. L. Cas., 293; 1 Greenl. Ev., §§ 22-27.

The defendants parted with all their title to them, and, therefore, could not sell them without a repurchase; and no liability would attach to the corporation, because they never agreed to pay a royalty. The consequence would be, that if the transfer to the corporation should not be regarded as a sale within the meaning of the license, the plaintiff would, by a species of *legerdemain*, be deprived of his royalty altogether. The same principle ought to govern the transfer of the unfinished rakes. The sale of them by the corporation would be protected by the license, because they were sold by the licensee in an unfinished state to the corporation, for the purpose of being finished and sent into the market and sold. Such a sale could not be treated otherwise than as one made by the authority and procurement of the defendants. They should therefore pay the royalty on them.

A case similar to this was recently decided by the Commission of Appeals in accordance with the views expressed,* and we think a contrary principle would be incompatible with the rights and obligations of the parties.

An exception was taken to an expression in the judge's charge, to the effect that rakes which the defendants had sent to their agents, constituted a sale, and the plaintiff was entitled to a royalty upon them. Taken by itself, disconnected from the rest of the charge, this would be erroneous. But when the whole charge is considered, the instructions on this subject were unexceptionable. The rakes in the hands of agents, passed in the sale to the corporation, and the jury were told very plainly, that the defendants had a right to sell them conditionally, and if any of them were returned to the defendants or to the corporation, by reason of their failure to conform to the condition on which they had been sold, the defendants were not liable for the royalty upon the rakes so returned. This was more favorable than the defendants had a right to ask, for the rakes, when returned, would form part of the effects of the defendants which were the subject of the sale made by them to the corporation, and consequently the plaintiff would be entitled to the royalty by virtue of that sale.

The criticism that the complaint does not embrace sales made by

* *Wilder v. Stearns*, 48 N. Y., 656.

the authority or procurement of the defendants, but only such as were made by them personally, is too critical.

Upon the whole case, therefore, we think the judgment should be affirmed.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

SAMUEL D. COLIE, APPELLANT, v. JOHN JAMISON,
RESPONDENT.

Bankruptcy — effect of, on title of bankrupt to real estate — Equitable title remaining in bankrupt after conveyance to assignee — Easement.

The defendant conveyed to the plaintiff an alley, reserving to himself the right to use the same, in common with the plaintiff, so long as he should continue to own the adjoining lot; subsequently defendant was, on his own application, declared a bankrupt, and conveyed all his property to his assignee, who afterward reconveyed the same to him, the proceedings in bankruptcy having been discontinued. *Held*, that the defendant remained the actual owner of the property, in equity, notwithstanding his bankruptcy and the conveyance to the assignee, and that his easement in the alley was not terminated thereby.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

In March, 1867, the defendant and Edward Gallagher conveyed to the plaintiff an alley way, the deed stating that it was "to be allowed to be used by the said parties of the first part hereto in common with the party of the second part hereto, as and for the purposes of a private alley, so long as said parties of the first part shall continue to own the remainder of said lot No. 5."

Before this action was commenced, both defendant and Gallagher had been adjudicated bankrupt on their voluntary petition, and they had duly assigned and conveyed all their property to the assignee, who had subsequently reconveyed to the defendant his property, the proceedings in bankruptcy against him having been discontinued. The plaintiff, claiming that by the assignment the defendant ceased to be the owner of the lot, built a fence across the alley, which was cut down by the defendant. Three other fences were

built, all of which were cut down. This action was brought to restrain the defendant from cutting down the fences, or entering upon the alley.

George Wadsworth, for the appellant.

John B. Greene, for the respondent.

GILBERT, J. :

The plaintiff asks a decree to forfeit a valuable right of the defendant, on sheer technical grounds. It will be vain for him to expect that a court of equity can forget its maxims and traditions, and be astute in searching for a way to afford him relief. He is entitled to prevail only on establishing his claim *strictissimi juris*.

The question is, whether the proceeding in bankruptcy terminated the defendant's ownership of the lot adjoining the alley; and we are of opinion that it did not. The view of the subject taken by the learned judge at Special Term, in substance accords with our own. The proceeding in the bankruptcy court having been duly discontinued before any actual disposition was made of the defendant's property, that court has no further jurisdiction of the matter, and the rights of the parties must be determined by our own laws.

No doubt the title to all the property of the defendant, including his right in the alley, vested in the assignee in bankruptcy by virtue of the bankrupt act, and if this fact destroyed the defendant's easement for a moment, it is gone forever. We think it did not have that effect. The transfer to the assignee was merely nominal and official. He took no beneficial interest whatever. The title was vested in him as an officer of the court, for the mere purpose of administration under the order and direction of the court. The transaction amounted to nothing more than a trust, the particular objects of the trust being limited and defined by the provisions of the bankrupt act, and the general purpose being to convert the defendant's property into money, and with the proceeds to pay his debts. The assignee in bankruptcy was only a nominal trustee, and was in fact an agent appointed by law to accomplish that pur-

pose. In such a case a resulting trust arises by implication of law, in favor of the bankrupt, which affects all the property undisposed of in the due execution of the trust; and as to all such property, the actual ownership in equity remains in the bankrupt.* It is expressly provided by statute, that when a trust is created, which vests the whole estate in law and equity in the trustees, such fact shall not prevent the persons creating the trust from granting or devising the trust estate subject to the execution of the trust, and that every such grantee or devisee shall have a legal estate in the lands, as against all persons except the trustees and those lawfully claiming under them.† Before our statute of trusts, a *cestui que trust* might assign or devise his equitable estate;‡ and the receipt of rents and profits was regarded as equivalent to legal seizin thereof.§ While under our statute a *cestui que trust* has no estate, legal or equitable, in the lands, but only a right to enforce the trust in equity, yet this principle applies only to those persons for whose benefit the trust was created. The power of disposition given by sections 60 and 61 to the creator of the trust, are marked indicia of ownership.¶ We think, also, that the defendant ought to be deemed the creator of the trust in this case, within the meaning of section 61, for it resulted solely from his petition in bankruptcy. It is also provided by statute, that when the purposes for which an express trust shall have been created shall have ceased, the estate of the trustee shall cease also.¶ No reconveyance is necessary; but, upon the cessation of the trust, the donor goes or remains in as of his former estate. Keeping these principles in view, and looking back at the history of the defendant's proceeding in bankruptcy, the trust resembles an incumbrance upon, rather than an estate in the land.

It appears that the defendant continued in possession of the trust property during the pendency of the proceeding in bankruptcy. We are of opinion that, according to a just and reasonable interpretation of the deed containing the reservation of the alley, the defendant continued to own his lot adjoining the same, in the sense in which that term was used in the deed, notwithstanding the proceedings in bankruptcy.

* Adams Eq., 31. † 1 R. S., 729, §§ 60, 61. ‡ Lewin on Trusts, chap. 23.
§ Id. ¶ Briggs v. Davis, 21 N. Y., 574. ¶ 1 R. S., 730, § 67.

This conclusion being decisive of the case, we need not consider the other questions.

The judgment should be affirmed, with costs.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed, with costs.

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136a	240
4	287
72	184
4	287
80	361

KENDRICK BLANCHARD, APPELLANT, v. LUCRETIA
BLANCHARD AND OTHERS, RESPONDENTS.

Will — power of sale contained in, not to be exercised during continuance of two lives in being — when valid — Suspension of power of alienation.

Defendant's testator, by his will, devised to his wife and two youngest children all his personal property, and the use of a farm until June 29, 1890, and directed his executor, within two years from that date, to sell the farm and divide the proceeds among certain persons named in the will. *Held* (1), that the widow and children took an estate for years in the farm, and that the remainder therein vested in the residuary devisees named in the will, subject to the execution of the power of sale; (2), that the power vested in the executor, being a mere naked power of sale, did not suspend the power of alienation, and was valid.

Beckman v. Benson (23 N. Y., 298) limited.

The will provided that "the personal property and use of said farm to be under the exclusive control and management of my wife, without interference by any person whatever." *Held*, that a valid power in trust was thereby created in the wife.

APPEAL from a judgment in favor of the defendants, entered upon the report of a referee.

This action was brought by the plaintiff for a partition of the premises described in the complaint, upon the ground that the apparent devise thereof by Reuben Blanchard, deceased, was void. The testator died on the 10th day of May, 1873, leaving a will of which the following are the material portions :

"Second. I give and bequeath to my beloved wife, Lucretia, and my two youngest children, Emma Jane Blanchard and Reuben Earle Blanchard, all of my personal property, also the use of my home farm where I now reside, on lot number fifty-five, in the town

of Victory, county of Cayuga, consisting of about 209 acres of land, until the 29th day of June, 1890 — the personal property and use of said farm to be under the exclusive control and management of my wife, without interference by any person whatever, which is to be received by her in lieu of dower.”

“Fourth. I order and direct that within two years after the 29th day of June, 1890, my said executor shall sell my home farm where I now reside, on lot number fifty-five, in the town of Victory, consisting of about 209 acres of land.” * * * The testator then directed the proceeds arising from the sale to be paid over to certain persons named by him.

“Lastly. I order and direct that all of the rest and residue and remainder of my property not hereinbefore disposed of, be divided among my children and grandchildren hereinbefore named, in proportion to the several sums of money hereinbefore bequeathed to them.”

The justice before whom the case was tried, held that the power of sale given to the executor worked an illegal suspension of the power of alienation, and was void.

GILBERT, J.:

We agree that the judgment below should be affirmed, but we cannot concur with the learned judge, in the exposition which he gave to the will. If the reasons for his judgment appeared therein, this general declaration might suffice; but as they do not, it is proper, in order to prevent future litigation, to give very briefly our views respecting the legal effect of the will. We are of opinion that all the testator's gifts are valid. The interest in the “home farm,” devised to his wife and two minor children by the second clause, is an estate for years, and is denominated in law a chattel real.* The distinction that once prevailed between the devise of the use of a chattel interest, and the devise of such interest itself, is now practically exploded.† Such an estate is treated as personal property in every respect. In case of the death of the owner, it goes to the executor, and not to the heir at law.‡ These devisees, therefore, took the gift to them as tenants in common,

* 1 R. S., 722, § 5; 1 Wash. Real Prop., 810.

† 4 Kent Com., 269; Fearn on Rem., 407.

‡ 2 Kent Com., 343.

notwithstanding it is one of personal property ; for it is provided by statute, that every estate devised to one or more persons shall be a tenancy in common, unless expressly declared to be in joint tenancy,* and that provision embraces all estates in land, whatever may be the duration of them. The remark of Surrogate BRADFORD on this subject, in *Putnam v. Putnam*,† was too broad.

We think the words, “the personal property and the use of the farm, to be under the exclusive control and management of my wife,” are sufficient to create a valid power in trust. No precise form of words is necessary to create such a power. Any words, however informal, which clearly indicate an intention to give a power, are sufficient for that purpose ; and it may be created to do any act which the grantor himself might lawfully perform.‡ It is not a trust, for two reasons : First, because the statute on this subject requires the legal estate to be vested in the trustee, in order to create a valid trust ; and, second, it does not authorize such a trust. But the object is protected as a power in trust, by the fifty-eighth section of the same statute.§

The learned judge at Special Term expressed the opinion that the power of sale of the “home farm” given to the executor, was void for the reason that the postponement of the execution thereof worked an illegal suspension of the power of alienation. That is a very important practical question. Powers of sale, to be executed after the lapse of a period which may extend beyond two lives in being, have been commonly inserted in wills of real estate, and if it should turn out that such powers are illegal, many wills will be invalidated. We are of opinion that the power in this case, being a naked power of sale, did not suspend the power of alienation. It is quite manifest that no estate or interest was devised to the executor. The whole estate of the testator, excepting the term given to the wife and minor children, would have descended, immediately upon his death, to, and vested in his heirs, but for the last clause in the will. By that clause it was devised to his children and grandchildren, as residuary devisees, subject to the term devised to the widow and minor children, and subject also to the execution of

* 1 R. S., 727, § 44.

† 4 Brad., 309.

‡ 1 R. S., 732, § 74.

§ 1 R. S., 728, §§ 49, 55 ; id., 729, § 58 ; *Downing v. Marshall*, 23 N. Y., 375 et seq.

the power after the termination of their estate for years.* The power conferred upon the executor was no more than a bare authority to sell the lands, an act expressly authorized by the statute of powers, whether the act is to be done in the lifetime of the grantor, or after his death.† There is not to be found in that statute any restriction respecting the time within which a power must be executed, although it does provide a limitation of the period during which the absolute right of alienation may be suspended by *an instrument in execution of a power*.‡ A power of sale is not an estate or interest in land. The provisions of the statute on this subject are explicit. It requires an absolute power of disposition, and defines such a power to be one by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit. In such a case the grantee takes a fee, subject to any future estate limited thereon, but absolute in respect to creditors and purchasers. § Even a devise of real estate, itself, to an executor to sell, without an authority to receive the rents and profits, vests no estate in him. ¶ An instrument in execution of a power is not regarded as an alienation by the grantee, but as the act of the grantor. Before execution, the power is a lien or charge upon the lands, ¶ and has no greater effect upon the interests of heirs or devisees than a mortgage made by the testator, payable at the time fixed for the execution of the power would have had. No one would question the validity of a mortgage given by a testator to secure the payment of a sum of money twenty years after his death, because it contained the usual power of sale. No doubt such a power in either case obstructs the sale or other disposition of lands by the owner, but not by reason of the time limited for the exercise of the power. It would ordinarily have the same effect if no restriction as to time were imposed; but the absolute right of alienation of the fee is not affected thereby. In the case before us, the residuary devisees took an estate in fee, which, notwithstanding the incumbrance of the power, is neither defeasible nor conditional,

* 1 R. S., 729, § 59.

† 1 R. S., 732, § 74.

‡ 1 R. S., 737, § 128.

§ 1 R. S., 732, 733, §§ 82-85.

¶ 1 R. S., 729, § 56; Germond v. Jones, 2 Hill, 573; Downing v. Marshall, 23 N. Y., 366.

¶ 1 R. S., 735, § 107.

and they may alienate it at pleasure. A conveyance from them and the devisees of the term would pass the whole estate. The testator might have made the devise to the residuary devisees in a form which would have given them an estate lasting only until the execution of the power, as there will be a short interval between the end of the term given to the widow and minor children, and the time within which the power must be executed. There being more than two residuary devisees, such a devise would have been illegal. The practical result of a devise of the fee incumbered by a power, may, in some cases, be the same; nevertheless, the latter is legal. The statute does not aim to do anything more than to prevent the inalienability of estates beyond the prescribed limit. It has not sought to limit the duration of a lien or incumbrance thereon. The only provisions on this subject are the fourteenth and fifteenth sections of the statute relating to the creation and division of estates.* The fourteenth section avoids *future estates*, which suspend the power of alienation. It is manifest that this section does not embrace the power in this case, because that does not create a future, or any other estate. The fifteenth section avoids *limitations* and *conditions* only. "Conditions" and "limitations" are terms well understood in law. A power is neither one nor the other. And, as before intimated, the residuary devisees in this case, who are the beneficiaries under the power, may at once alienate all the estate they got under the will. They can alienate the fee in the land, subject to the power, and they may sell their respective shares in the proceeds of the sale which shall be made in execution of the power. The statute on this subject expressly provides that limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in relation to future estates in lands, and those rules authorize the alienation of expectant estates.† How then, and of what, is there a suspension of the power of alienation? We are not aware of any adjudication in conflict with the views on this subject, which we have now expressed. In *Beekman v. Bonsor*,‡ Comstock, J., remarked, that the power in

*1 R. S., 723.

†1 R. S., 773, § 2; id., 722, § 9, 725, § 35; *Lawrence v. Bayard*, 7 Paige, 76; *Sheriden v. House*, 4 Keyes, 588.

‡23 N. Y., 317.

trust in that case would have been a lawful one, if the postponement of its execution for an absolute period of time did not suspend the power of alienation in a manner which the statute did not permit. This however was *obiter dictum*, and is hardly reconcilable with the decision of the same judge, in *Downing v. Marshall*,* for, in the latter case, a power in trust, the execution of which was postponed until after two lives in being, was upheld.

Whether we regard the power of sale, therefore, as intended to effect an out and out conversion of the realty into personalty, or as a power in trust of real estate, it is in our opinion valid.

There can be no question as to the validity of the direction contained in the power, respecting the disposition of the proceeds of the sale.†

We have assumed that the birth of the posthumous child was not under circumstances to work a revocation of the will, according to the provision of the Revised Statutes on that subject.‡

For the reasons stated, the judgment must be affirmed.

Judgment affirmed, with costs.

4 302
71 375

JOHN N. DORRIS, RECEIVER, ETC., PLAINTIFF, v. EDWARD F. FRENCH, DEFENDANT.

Stockholder of corporation — when liable for subscription for stock — fraud of directors — no defense to stockholder.

The defendant with others signed an agreement to unite in the formation of a company, and to take a number of shares of stock therein specified; subsequently he, with others, signed a certificate of incorporation as required by the act of 1848. In an action brought by the receiver of the company to recover the amount due upon the shares subscribed for by the defendant, *held* (1), that the defendant was estopped from denying that the company was legally incorporated; (2), that he was liable for the number of shares subscribed for by him.

Dorris v. Sweeney (84 Barb., 636) distinguished.

The fact that the promoters of a corporation have purchased for it a patent right,

* 23 N. Y., 366.

† *Crittenden v. Fairchild*, 41 N. Y., 289; *Kinnier v. Rogers*, 49 id., 531; *Kane v. Gott*, 24 Wend., 641.

‡ 2 R. S., 64, § 48.

of which they were the owners, at an exorbitant price, furnishes no defense to a stockholder in an action brought by the corporation to recover the amount due upon the stock held by him.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict directed in favor of the plaintiff.

This action was brought to recover from the defendant the amount claimed to be due from him on certain shares of stock in The Buffalo Fruit Preserving Company.

In the latter part of October, 1865, the defendant and others signed a paper whereby they agreed to unite in the formation of a company for the purpose of purchasing the exclusive right to make, use and vend Nyce's patent for preserving fruit, the paper designating the number of shares to be subscribed for by each. Subsequently, the defendant and nine others executed and acknowledged the certificate of incorporation required by the act of 1848, authorizing the formation of corporations for manufacturing purposes. Subsequently the plaintiff was appointed receiver of the corporation, which had been dissolved for failing to exercise its privileges for one year. The defendant set up, as a defense, that he was not a stockholder; that the company was never legally incorporated; and that his subscription was procured through fraud.

G. A. Scroggs, for the plaintiff. The second exception, namely, "that the plaintiff has failed to show that the defendant was a stockholder in said corporation," is not well taken, because the plaintiff has shown that the defendant was a stockholder in said corporation. The defendant by subscribing the instrument, in which he agreed to unite with those who signed the same instrument, in forming an incorporate company, and mutually agreed with them to pay the amount set opposite his name, which is \$3,000, to said company for stock therein, and the certificate of incorporation prescribed by the act providing for the organization of manufacturing and other companies, became a stockholder in said corporation, and liable to pay his subscription. (*Stanton v. Wilson*, 2 Hill, 153; *Spear v. Crawford*, 14 Wend., 20; *Hamilton, etc., P. R. Co. v. Rice*, 7 Barb., 157; *Buffalo and N. Y. C. R. R. v. Dudley*, 14 N. Y., 336; *Lake Ontario, etc., R.*

Co. v. Mason, 16 id., 451; *Rensselaer and W. P. R. Co. v. Barton*, id., 457, note; *Buffalo and P. R. Co. v. Hatch*, 20 id., 157, per GROVER, 161, close of opinion; *Trustees, etc., v. Allen*, 14 Mass., 172; *Burr v. Wilcox*, 22 N. Y., 551; *Mechanics' Bank v. N. Y. R. Co.*, 13 id., 599, opinion of Judge COMSTOCK, 627; *Stewart v. Hamilton*, 2 Denio, 417, opinion of chancellor; *Andrews v. Pontue*, 24 Wend., 285; *Poughkeepsie, etc., v. Griffin*, 24 N. Y., 150; *Angell & Ames on Corp.* [9th ed.], §§ 517, 523.) The preliminary agreement signed by the defendant was authorized and valid. (*Angell & Ames on Corp.* [9th ed.], § 523; *Stanton v. Wilson*, 2 Hill, 153; *The Buffalo, etc., v. Dudley*, 14 N. Y., 336; *Lake Ontario v. Mason*, 16 id., 451; *Buffalo and P. R. Co. v. Hatch*, 20 id., 157, see GROVER, close of opinion; *Hamilton and P. R. Co. v. Rice*, 7 Barb., 157.) The defendant cannot question the legal existence of the corporation, or the right it has to its franchises. (Code, § 430; *The People v. Trustees of Geneva College*, 5 Wend., 211-220; *McFarlan v. The Triton Ins. Co.*, 4 Denio, 392-397; *Eaton v. Aspinwall*, 19 N. Y., 119; *The People v. Utica Ins. Co.*, 15 Johns., 358; *Methodist E. U. Church v. Picket*, 19 N. Y., 482; *Thompson v. N. Y. R. Co.*, 3 Sandf. Ch., 625; *Buffalo, etc., R. Co. v. Cary*, 26 N. Y., 75; *Trustees of Vernon v. Hills*, 5 Cow., 23-26; *Schenectady and S. P. R. Co. v. Thatcher*, 11 N. Y., 102-113.)

H. E. Day, for the defendant.

GILBERT, J. :

This case is unlike that of *Dorris v. Sweeney*,* in this, namely, that the defendant subscribed and acknowledged the certificate of incorporation. The statute authorizing the formation of manufacturing companies,† provides that the persons who shall have signed and acknowledged the certificate, and *their successors*, shall be a body politic and corporate. It requires that the aggregate amount of the capital stock of the company, and the number of shares of which it consists, shall be stated. But it does not require that the interest of the subscribers to the certificate, respectively, shall be set forth. That must, therefore, necessarily be fixed by some agreement separate from the certificate. Such an agreement,

* 64 Barb., 686.

† 3 Edm. Stat., 783.

consummated by signing the certificate, amounts to the same thing as subscribing formal articles of association, preliminary to organizing a corporation. The agreement and the certificate constitute but one transaction, having a single object, namely, the formation of the corporation. It has long been held, and never, I believe, disputed, that the corporation, when formed, may enforce payment of the subscriptions to its capital stock against persons who subscribed its articles of association before the corporate body had a legal existence.* It was with this rule of law in view, probably, that the legislature omitted any specific provision regulating the manner of becoming stockholders, while at the same time they authorized the capital stock to be paid in — one-half thereof within one year, and the other half within two years, and made the stockholders severally liable for the debts of the corporation, to an amount equal to the amount of stock held by them respectively, until the whole amount of capital stock should have been paid in,† and authorized the corporation to demand from the stockholders, respectively, payment of their subscriptions, on pain of a forfeiture of their stock.‡ It is very evident from these provisions, that the design of the legislature was to provide protection to creditors, by devolving personal liability on the stockholders, and to give to the corporation, for the indemnity of the latter, the power of coercing payment of subscriptions. But neither of these objects could be accomplished, unless there were some means of ascertaining who had become stockholders, and the amount of stock held by them, besides the certificate of incorporation; for that might not show the names of all the stockholders, or the amount of stock held by any of them. These facts might be established by proof of payments on account of stock, and the taking of the usual stock certificates; but that kind of proof would not be as satisfactory as the ordinary mode of subscribing which was adopted in this case. We are of opinion, therefore, that the original liability of the defendant as a subscriber to the stock was established. Stockholders are estopped to deny the lawful existence of corporations which they have helped to create.

* Buff., etc., R. R. v. Hatch, 20 N. Y., 161; Burr v. Wilcox, 23 id., 551; Strong v. Wheaton, 38 Barb., 622; Ang. & A. Corp., § 517 *et seq.*

† Sec. 10.

‡ Sec. 6.

These views would require us to direct a judgment in favor of the plaintiff. But there are other facts which demand consideration. Among the defenses pleaded, one was that some of the promoters of the company, who signed the certificate of incorporation and were named therein as trustees, were intrusted with the duty of purchasing the patent right, under which the business of the company was conducted; that they purchased it, in fact, of themselves and their associates, for the corporation, for the price of \$50,000, whereas the real price was \$16,000, and that the difference was divided between them and their associates. This, if true, was a gross fraud, and no proof of an actual intent to cheat, beside the matter itself, in such a case, is requisite to invalidate the transaction. The persons who undertook the duty of purchasing the patent, thereby became agents of the corporation for that purpose. The same principles are applicable to them, as govern the relation of trustee and *cestui que trust*. They were bound not to do anything which could place them in a position inconsistent with the interest of their principal. Agents are not permitted to become secret vendors of property which they are authorized to buy for their principals, or indeed to deal validly with their principals in any case, except where there is the most entire good faith and full disclosure of all facts and circumstances, and an absence of all undue influence, advantage or imposition. Nor will an agent, employed to purchase, be permitted, unless by plain and express consent of his principal, to make any profit out of the transaction.* If those who made the purchase for \$16,000 were at the time acting as projectors or promoters of the company, they can make no profit at the company's expense by a purchase and resale.† The injury occasioned by the alleged fraud, however, was done to the corporation, and not to the defendant. It constitutes no defense to an action at law, brought by the corporation or its receiver, to recover his subscription to the capital stock. The only mode of making it available to the defendant

* Story Eq. Jur., § 315; Dally v. Wonham, 83 Beav., 154; Bentley v. Craven, 18 id., 75; Tyrrell v. Bank of London, 10 H. L. Cas., 26; Beck v. Kantorowitz, 3 K. & J., 280.

† Foss v. Harbottle, 2 Hare, 489; Denamore Oil Co. v. Denamore, 14 P. F. Smith, 49; McElhenny's Appeal, 11 id., 188.

would be by a bill in equity, in which the persons accused of the fraud, as well as the corporation, would be necessary parties. The learned judge, however, entertained the defense, and in submitting the case to the jury, charged them, "that the fact that the patent was owned by the promoters of the company at the time the defendant was induced to make his subscription, was not a sufficient defense, unless there was evidence that it was suppressed with intent to cheat and defraud." This, we think, was erroneous, and, if the defense was before the court, the error was material.

We are also of opinion that the learned judge erred in refusing to submit to the jury the question, whether the company had not, with the assent of the defendant, issued the stock for which he subscribed, to other parties, who had received the same and paid the company for it. There is evidence in the case which would have warranted the jury in finding that fact in favor of the defendant; and we have no doubt that if so found, it would constitute a complete bar to this action.

The motion for a new trial must be granted, with costs to abide the event.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

New trial granted, costs to abide event.

GEORGE O. TOWNSEND, APPELLANT, v. ROBERT BISSELL
AND ABEL DAVIS, RESPONDENTS.

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Easement — Right of way — Adverse use — when presumed — Contract of sale — title of vendee in, superior to that of a grantee with notice.

When the owners of adjoining lots make a way between them, each setting off an equal portion of land for that purpose, and they and their grantees continue to use it in common as a way for a period of twenty years, the inference is that such use was under a claim of right and adverse.

When a party, with knowledge of the existence of a contract of sale for certain lands, takes a deed from the owner of the same lands, the equitable title of the vendee in the contract will prevail over that given in the prior conveyance.

APPEAL from a judgment in favor of the defendants, entered on the report of a referee.

The referee found, among other things, that on the 14th day of November, 1868, the defendant Abel Davis was the owner and in possession of premises known as the Wiley lot, in Watertown, and on that day contracted in writing to sell said premises to one Isaac Sprague. The said Sprague contracted to sell his interest in said premises to Elam L. Holcomb, May 1, 1869, which contract Holcomb transferred to Sarah Ann Cooper, March 31, 1870. On the same day Sprague transferred in writing his contract with Davis to the said Cooper with the written consent of Davis. Some time in the fall of 1870 the said Cooper assigned the last mentioned contract to the plaintiff, who then went into possession of the premises, and, having paid the balance of the contract, said Davis, pursuant to the covenants in said contract, gave to the plaintiff a deed of the premises, dated June 8, 1872.

On and before the said 14th day of November, 1868, the defendant Robert Bissell was the owner and in possession of premises on said High street, and adjoining the premises described in the deed aforesaid from Davis to the plaintiff.

A dwelling-house was built upon each of said lots about the year 1822, and at the same time the occupants of the respective premises used a common lane about ten feet wide, one-half taken from each lot, and the center line of the lane from High street being the division line between the lots; the said common way or lane was, from 1822 until about the time of the commencement of this action, used by the occupants of the respective lots under a claim of right. The Bissell lot is not accessible by a team to the rear, except through this lane, the lot being only two rods wide, and one side of the house forming the marginal fence of a part of the lane. The said lane has been a portion of the time since 1822 inclosed by a fence on each side but open at the street.

The defendant Bissell was in possession of the said lane, using the same in common with the occupants of the said Wiley lot, as above stated, at the time the said Isaac Sprague purchased the Wiley lot, November 14, 1868. Sprague knew of such uses, and that Bissell claimed the right of way, and purchased and went into possession upon the assumption that Bissell had the right of way. The right as appurtenant to the said Bissell lot was never disputed

or questioned by any owner or occupant of the Wiley lot until the plaintiff did so after he had taken his deed from Davis.

When the plaintiff took the assignment of the Sprague contract, and when he obtained the conveyance from Davis, he knew that the defendant Bissell was in the actual use of the said easement, or right of way, under a claim of right to such user.

Bissell, after the making of the contract of sale, and with knowledge of it, took a conveyance from Davis of the right of way, but the referee found that the said Bissell, in taking a conveyance of the right of way, did so simply to confirm a title which he had acquired by long user.

Anson B. Moore, for the appellant. To authorize a presumption of a grant, the enjoyment of the easement must be not only uninterrupted for a period of twenty years, but it must be adverse; exclusive, and under a claim or assertion of right; and it must be with the knowledge and acquiescence of the owner. (*Parker v. Foote*, 19 Wend., 309-313; *Flora v. Corbin*, 38 N. Y., 111; 32 How., 439; Albany L. J., Oct. 5, 1872, page 234; *Wolfe v. Frost*, 4 Sandf. Ch., 72.) It is well settled that to constitute an adverse possession, it must be adverse at its commencement and so continue. It must be hostile to the owner. A person who enters without claiming title is deemed to hold for the rightful owner. (*Brant ex dem. Walton v. O. & D. Ogden*, 1 Johns., 156; *Jackson v. Johnson*, 5 Cow., 74; *Jackson v. Woodruff*, 1 id., 276; 1 Salk., 246; *Smith v. Burtist*, 6 Johns., 218.) Every presumption is in favor of a possession in subordination to the title of the true owner. (*Jackson v. Sharp*, 9 Johns., 164; *Hammond v. Zehner*, 21 N. Y., 120, CLERKE, J.) The enjoyment of an easement for twenty years and over, where the party enters and uses by permission, or by favor, and not under a claim of title and in a manner hostile to plaintiff, cannot ripen into an adverse possession. The simple proof of an exclusive and uninterrupted enjoyment of an easement for more than twenty years, is only *prima facie* evidence of its being adverse, and any such presumption may be rebutted by evidence. The user in this case was not exclusive, but was with plaintiff and his grantors. The slightest evidence will overcome any such presumption. (*Hart v. Voss*, 19 Wend., 365, opinion of

COWEN, J., 366.) The right to enter upon lands, build a dam there, etc., given without consideration, does not operate either by way of grant or estoppel to create any continuing or present right, nor can it be the basis of adverse possession. (*Babcock v. Utter*, 1 Keyes, 115-397; 32 How., 439; *Deater v. Holmes*, 10 Johns., 246.)

D. O'Brien, for the respondents. The use and occupancy of the lane by the defendant Bissell, and those who were proved or assumed to be his grantors and predecessors in title, present the only question of law decided by the referee in the case. He held that an adverse inception of an easement might be inferred from user, and that the *onus* was on the plaintiff to show that the easement originated in permission or license. This proposition is correct. (*Hammond v. Zehner*, 21 N. Y., 118; *Hamilton v. White*, 4 Barb., 61; *Miller v. Garlock*, 8 id., 153; *Hammond v. Zehner*, 23 id., 473; *Lansing v. Wiswall*, 5 Denio, 213; *Corning v. Gould*, 16 Wend., 529.)

GILBERT, J.:

It is evident from the testimony, and from the fifth finding of fact, that Bissell stands in the position of a volunteer. He paid nothing for the grant from Davis to him, and he had actual notice of the previous sale by Davis to Sprague. Unless, therefore, there was a right of way in the lane, which Davis might confirm by express grant without violating the rights acquired under the contract with Sprague, the plaintiff's equitable title under that contract should prevail over the prior conveyance to Bissell.*

The general principle on which this doctrine proceeds is, that from the time of the contract for the sale of the land, the vendor holds the legal title as trustee for the vendee, and every subsequent purchaser from either, with notice, becomes subject to the same equities, as the party from whom he purchased would be.† The provisions of the Revised Statutes‡ avoid, against subsequent purchasers, unrecorded instruments creating interests in real estate, except contracts for the sale or

* Fonbl. Eq., bk. 1, chap. 5, § 2.

† *Champion v. Brown*, 6 Johns. Ch., 403; *Hathaway v. Payne*, 34 N. Y., 103.

‡ 1 R. S., 756, §§ 1, 88.

purchase of lands. The referee finds that the lane in question existed since the year 1822; that it was formed by taking one-half of its width from the lots owned by the plaintiff and Bissell respectively, the center line of the same being the division line between the lots; and that it has been used continuously ever since by the occupants of the lots, respectively, in common, under a claim of right.

None of these facts are disputed, except that the use of the lane by Bissell and his grantors was under a claim of right. The appellant contends that there is no evidence of such claim. We cannot assent to that. The fact that a part of the lane was taken off from the Bissell lot, and that it furnished the only means of access with wagons to the rear of that lot and to one side of the house thereon, and the absence of evidence of any act of Bissell or his grantors showing that the use was not under a claim of right, or that any former owner of the plaintiff's lot had ever disputed the right, together with its continued and uninterrupted use for so long a period, furnish very satisfactory evidence that the use of it by both parties was under a claim of right. It is very true, that mere presumption, unsupported by acts, will not suffice as a muniment of title to an easement in land. On the other hand, where the owners of adjoining lots make a way between them, each setting off an equal portion of land for that purpose, and they and their grantees continue to use it in common as a way for a period of twenty years, we think the reasonable inference is, that such use was under a claim of right, and adverse.* It is not necessary to assert such right in words, or by any particular acts or formula of conduct, or to show that the exercise of the right did any actual damage to the party against whom it is claimed, provided it was an invasion of his right. Where there has been a use of an easement for twenty years, under such circumstances, it will, in the absence of contradictory or explanatory evidence, authorize the presumption of a grant.†

The taking of the deed from Davis by Bissell, did not affect the right of the latter. It was merely evidence for the referee to con-

* *Miller v. Garlock*, 8 Barb., 153.

† *Wash. on Eas.* (3d ed.), 186 *et seq.*, and cases cited; *Hall v. Augsburg*, 46 N. Y., 625.

sider, in connection with the other evidence, in determining the question whether the previous use had been adverse or permissive.* The conversation of Davis with Sprague did not contravene the rule against allowing evidence of the declarations of third persons not parties to the record. It operated only as proof of notice to the plaintiff's assignor, of the claim of Bissell in respect to the lane, and on that ground was competent, because the plaintiff can claim no greater rights than Sprague. The evidence was not necessary to establish the defense, for the reason that the lane itself was open and visible; and that fact was sufficient to charge the plaintiff with notice that it might be an easement. Even if that evidence was erroneously admitted therefor, such an error would not require a reversal of the judgment.†

The judgment should be affirmed, with costs.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed, with costs.

JOHN B. SCHOLEY, EXECUTOR, RESPONDENT, v. DAVID F. WORCESTER AND FRANCES G., HIS WIFE, APPELLANTS.

Creditor — when estopped, by his acquiescence therein, from asserting that a transaction of his debtor was fraudulent.

Where money is lent to one, who, with the knowledge and assent of the creditor, uses the same in erecting buildings upon land belonging to his wife, the creditor cannot afterward maintain an action to charge the debt upon the land of the wife, on the ground that such disposition of the money was, as to him, fraudulent.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

This action was brought to charge the lands of the defendant Frances G. Worcester with the payment of a debt due from her husband to the estate of Elizabeth G. Scholey, deceased. The

* *Perrin v. Garfield*, 37 Vt. 310.

† *Vandervoort v. Gould*, 36 N. Y., 639.

premises were, from the time of their purchase, in July, 1867, the property of the said Frances. The debt, attempted to be charged upon these premises, was contracted in 1867, for a loan of United States bonds to David by the deceased, a sister of Frances; the proceeds of the bonds having been used in erecting a house on the land in question.

Geo. F. Danforth, for the appellants.

F. A. Macomber, for the respondent.

GILBERT, J. :

There is evidence which tends to raise an inference that the expenditure of the moneys used by the defendant David Worcester, in building the house upon lands of his wife, was made with the knowledge and approbation of the testatrix, Mrs. Scholey. If it should turn out that such was the case, the fact would constitute a perfect bar to the relief sought against Mrs. Worcester; for a party who has been privy, and assented to a transaction which may be treated as fraudulent as to creditors, cannot impeach it on that ground. In *Steel v. Brown*,* Lord MANSFIELD held a bill of sale, where possession had not been taken under it, good between the parties to it, and creditors who concurred in the non-delivery of possession. So a transfer will not be held fraudulent against persons who became creditors after they had notice of it, or who were privy and assented to it.† In *Olliver v. King*, a father, after consultation with his brother, executed a voluntary deed assigning a considerable portion of his property to his two sons, and by his will made the brother and sons executors, and died. The brother never impeached the settlement, but acted under the will, and was a party to several transactions proceeding upon the assumption of the validity of the settlement. At his death his executors impeached the voluntary deed as void against the brother, he being a creditor of the debtor, on a bond made prior to the deed. The vice-chancellor decided against the validity of the deed,‡ but the

*1 Tannt., 381.

†*Sagitary v. Hide*, 2 Vern., 44; *Woodham v. Baldock*, 3 J. B. Moore, 11; *Bamford v. Baron*, 2 T. R., 594; *Olliver v. King*, 8 De G., Mac. & Gord., 110.

‡1 Jur. (N. S.), 1067.

lords justices reversed that decision on appeal. Sir G. J. TURNER said: "The deed was executed with his [the creditor's] full consent and concurrence and he could not be permitted to say (and if he could not have been, his executors could not be) that the deed thus executed with his full consent and concurrence, was a fraud upon him within the meaning of the statute. (13 Eliz., chap. 5.) My opinion is based on this. I consider the true effect of this agreement to be, that John [the creditor], by his conduct, agreed to this alienation of the assets, and must have consented to take satisfaction out of the property which remained." A similar principle has often been asserted by the courts of this State.* Indeed, the rule is elementary, that parties, who, by their conduct, or even silence, have led others to act in opposition to their rights, cannot afterward set up those rights against them.

Upon the trial, the counsel for Mrs. Worcester offered to prove that her husband, David, was induced to come to Rochester with his family at the request of the testatrix, and that at her suggestion and request the premises in this case were purchased, she expressing a desire that the title should be in Mrs. Worcester. The evidence was excluded, and it is not unreasonable to infer that the court supposed that the facts to which the evidence offered related, were to be proved by conversations between the defendant David and the testatrix. The offer, however, was not restricted to that particular mode of proof, but was made in general language, which would embrace other and competent kinds of evidence. The facts offered to be proved were certainly competent and very material, according to the principle to which we have adverted; and for the error in excluding the evidence offered, there must be a new trial.

Judgment reversed and new trial ordered, costs to abide event.

* Pell v. Tredwell, 5 Wend., 697; Phillips v. Wooster, 36 N. Y., 414; Baker v. Gilman, 52 Barb., 89.

SAMUEL T. GRAVES AND OTHERS, PLAINTIFFS, v. DAVID BRINKERHOFF, DEFENDANT.

Submission under Code, § 372 — both legal and equitable relief may be given under — Money paid under mutual mistake — when it may be recovered.

The plaintiff having agreed to purchase of the defendant certain land at a stipulated price per acre, a survey was made of the land, and the plaintiff paid the amount appearing thereby to be due from him. Subsequently it was discovered that the land did not contain the number of acres called for by the survey. *Held*, that the plaintiff was entitled to recover the amount paid by him through mistake, with interest thereon from the time of payment.

After the sale to plaintiff, the defendant sold the remainder of the land to third persons, relying upon the survey, thereby conveying to such persons more land than they were entitled to. *Held*, that the plaintiff was not thereby prevented from recovering the excess paid by him.

Upon submission of a controversy under section 372 of the Code, the court is bound to give such judgment as the facts require, whether it be legal or equitable.

CONTROVERSY submitted upon an agreed statement of facts, in pursuance of section 372 of the Code. Some time prior to March, 1867, the defendant made an oral agreement with the plaintiffs for the purchase of a piece of land situate in the town of Seneca, Ontario county. The quantity of land was unknown. The price agreed upon was \$115 per acre. In pursuance of such agreement the land was surveyed, and a map thereof made. The plaintiffs were present at the survey, by S. S. Graves, and the defendant was present in person. After the survey was made and a map thereof furnished, a written agreement was entered into, bearing date March 1st, 1867, in and by which the parties undertook to ratify their previous oral agreement for the sale and purchase of said land. In this agreement the description was copied from the surveyor's map and the figures thereon. The contract was executed by the delivery of said deed, the payment of a portion of the moneys mentioned in said contract, and by executing and delivering to the defendant a bond and mortgage for the balance. The plaintiffs and defendant supposed the number of acres mentioned in the contract and deed to be correct, and never knew of the mistake until the latter part of the year 1873, when the plaintiffs had occasion to have a portion of the land

resurveyed, and then, for the first time, was it discovered that instead of forty-one and eighty-four one-hundredths acres, as set out in the contract, the land sold by the defendant measured but thirty-seven and forty-one one-hundredths acres, of all of which the plaintiffs immediately informed the defendant, and demanded the difference of him, with interest, which he declined to pay over, except upon the judgment of this court. The mistake between the parties to the submission was mutual. Neither of the parties knew or know anything about surveying or the computation of amounts of land by links, chains and courses, and each took the computation at the time to be correct. The plaintiffs overpaid, through said mistake, the sum of \$391, on which they claim interest, as they have paid interest from March 1, 1867. At the time of the survey and the making of the contract and deed above mentioned, the defendant was the owner of one hundred and five and eighty-one one-hundredths acres of land in a body from which the land in question was taken; and after the sale to the plaintiffs, and about the year 1869, the defendant, relying upon the survey of that portion sold to the plaintiffs, and believing it to be correct, sold without survey, according to the boundaries as they then existed, the residue of said land in a body to Bronson & Herendeen, of Geneva, N. Y., for sixty-five acres more or less; but the said Bronson & Herendeen bought the same in bulk, without any reference to quantity.

George B. Dusenberre, for the plaintiff. The deed does not embody the final intention of the parties. (*Gillespie v. Moon*, 2 Johns. Ch., 585; *Prior v. Williams*, 2 Keyes, 538; 5 Mason, 572; 25 Vermont, 576; 2 Johns. Ch., 630; 32 Me., 274.) When a conveyance, executed for the purpose of giving effect to and executing an agreement, by any mistake, gives a purchaser less than the agreement entitles him to, he may call on the court to rectify the defective conveyance and give him all that his agreement comprehended. (Kerr on Mistakes, 419; *Tilton v. Tilton*, 9 N. H., 385; *Blessing v. Beatty*, 1 Rob., 286; *Blodgett v. Hobart*, 18 Vt., 414.) The courts will always relieve against a mutual mistake of fact, where one party pays money to another through such mistake. (Chit. on Cont. [Am. ed. of 1844], 426 and cases cited in notes; Chitty on Bills, 425; 2 Smith Leading Cases, 237; *Mowatt*

v. *Wright*, 1 Wend., 355; *Burr v. Veeder*, 3 id., 412; *Waite v. Leggett*, 8 Cow., 195; *Union Bank v. U. S. Branch Bank*, 3 Mass., 74; *Garland v. Salem Bank*, 9 id., 389; *Bank of Commerce v. Union Bank*, 3 N. Y., 230; *Kingston Bank v. Eltinge*, 40 id., 391; *Duncan v. Berlin*, 46 id., 685.) Where the money is erroneously paid by one party to another in mutual ignorance of facts which if known would have prevented the payment. (1 Story Eq., § 142; *Burr v. Veeder*, *supra*.) Where money is paid by one party to another through a mutual mistake of fact in respect to which both were equally bound to inquire. (*Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, *supra*.) Nor is it any defense that the plaintiff had within his reach the means of ascertaining the truth, or that he omitted to use vigilance and care by which the mistake would have been avoided. (*Kingston Bank v. Eltinge*, 40 N. Y., 391; *U. Nat. Bk., Troy v. Sixth Nat. Bk., N. Y.*, 43 id., 452.) Nor does negligence in making the mistake prevent the party from recovering back money paid under a mistake of fact. (*Duncan v. Berlin*, 46 N. Y., 685; *National Life Ins. Co. v. Jones*, 1 N. Y. Sup. Ct., 446 and cases there cited; *Lawrence v. Am. Na. Bk.*, 54 N. Y., 433; *Nat. Bk. Com., in N. Y., v. Nat. Mec. Banking Association*, 55 id., 211.) It makes no difference that the defendant cannot be restored to his original position upon paying back the money. (*The Kingston Bank v. Eltinge*, 40 N. Y., 391; *Mayer v. The Mayor of N. Y. City*, 9 Sup. Ct. [2 Hun], 306.)

D. B. Backenstose, for the defendant. It is impossible to place the parties in *statu quo*, and therefore the court will not relieve the plaintiffs. (*Martin v. McCormick*, 4 Sandf., 366; 1 Story Eq. Jur. [10th ed.], ¶ 138, p. 138; 2 Kent's Com. [11th ed.], 656 [marg. page 492], note.)

GILBERT, J.:

As a general rule, where a person by mistake of fact, pays money to another which he does not owe him, the law implies a promise to repay it.* Whether in a case like this, where the mistake occurred in paying the purchase-money of lands, and the purchase has been consummated by a conveyance, the remedy can be

* *Wheadon v. Olds*, 20 Wend., 174.

pursued in an action at law, or must be sought in a court of equity, it is not material to inquire. For, upon a submission of a controversy pursuant to section 372 of the Code, the court is bound to give such judgment as the facts require, whether the relief be legal or equitable.

The facts in this case clearly entitle the plaintiffs to a return of the sum claimed. It is a case of a plain mistake, and one which must be deemed material.*

We think it is not an obstacle to the relief sought, that the parties cannot be put in the position they were in before the sale was made; in other words, that it is not necessary, in order to do justice to the defendant, that the plaintiffs should reconvey the land, and that the contract of sale should be rescinded. The defendant sold the land for a fixed price per acre agreed upon, and the plaintiffs are entitled to both the land and the amount which they overpaid by mistake. This is the only way in which the mistake can be corrected. To annul the sale would not do that, but would deprive the plaintiffs of a fair bargain without any fault on their part. Such a decree would not be in accordance with the rule in equity on this subject. That rule merely requires that the parties shall be placed in the same situation they would have been in, if the mistake had not happened. Upon that principle, the plaintiffs are entitled to the land, but the defendant is entitled only to a sum less than that which he received, which is ascertained by deducting therefrom the amount claimed by the plaintiffs.

Nor does the subsequent sale of the residue of the defendant's land to other parties affect the equitable rights of the plaintiffs. They were strangers to that transaction, and if the mistake which they now seek to have corrected caused the defendant to make that sale, at a price less than he would otherwise have obtained, the surveyor who caused the mistake, and not the plaintiffs, is responsible.

These are the only questions presented. The plaintiffs are, therefore, entitled to recover the sum of \$391, with interest from March 1, 1867, with costs.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Ordered accordingly.

*1 Story Eq., §§ 140, 141; Adams Eq., 188; *Marvin v. Bennett*, 26 Wend., 169.

GEORGE W. WOOD, APPELLANT, v. ROBERT SHULTIS,
RESPONDENT.

Statute of frauds—property received under contract void by—when promise to pay for, implied—Justice's Court—amendment to complaint—when allowed—Code, § 64, sub. 11.

Where a party receives property under a contract, void by the statute of frauds, and, for that reason, subsequently refuses to fulfill the contract on his part, the law implies a promise to pay the value of the property so received.

In a proper case the statute (Code, § 64, sub. 11) makes it the imperative duty of a justice to grant an amendment upon proper terms. The word "may" in the statute means "shall."

APPEAL from a judgment of the County Court of Ontario county, affirming a judgment of a justices' court, in favor of the defendant.

The complaint alleged that the plaintiff made a contract with the defendant to sell him forty-five trees standing upon his land, in consideration of which the defendant agreed to dig a ditch upon his own land to carry off water from the land of the plaintiff; that he had cut and carried away the trees and refused to dig the ditch. The defendant set up that the contract was void under the statute of frauds.

D. Herron, for the appellant.

John Gillette, Jr., for the respondent.

GILBERT, J. :

The only questions in this case are, whether the justice erred in excluding the evidence offered by the plaintiff, and in denying his application to amend the complaint, and we are of opinion that he did, in both instances.

The complaint, it is true, set forth a cause of action arising upon the contract, and the specific relief demanded was damages for the breach. But it also contained all the facts necessary to entitle the plaintiff to recover upon the defendant's implied promise to pay what the timber was worth. And the prayer for relief did not disable the justice from granting any other relief which would have been adapted to the case. Such a variance between allegation and proof should have been disregarded, for there is not the slightest

pretext for saying that the defendant could have been misled by it. The complaint set forth the contract, and averred that the defendant had taken the timber pursuant thereto, but had failed to perform the contract on his part. The answer contained a general denial and an averment that the contract was not in writing, and was for that reason void. If the complaint had shown that the contract was void, there would have been no variance. How then could the defendant claim to have been misled by such an omission, when the fact appeared in his answer? That the plaintiff would have been entitled to recover, upon the evidence offered, the actual value of the timber, cannot be doubted. The defendant had taken the timber from the plaintiff under a verbal contract which was void by the statute of frauds. That timber was the consideration of the defendant's part of the contract. He had failed to perform the contract, and on the trial repudiated it altogether. The law affords no sanction to such a mode of appropriating the property of another, but, on the contrary, implies from such circumstances a promise to pay the value of it.* If the contract had been not only void, but illegal, the plaintiff, on that account, would not have had any remedy, † but, being invalid only by reason of its not being in writing, the plaintiff had a clear remedy. ‡ Such a ground of nonsuit as that in this case, if finally sustained, would retrograde the practice more than a quarter of a century.

The justice also committed an error in denying the motion of the plaintiff for leave to amend his complaint. It is manifest that substantial justice would have been promoted thereby, although the amendment was not absolutely necessary, for it would have prevented an erroneous nonsuit, and have saved the parties an expensive and useless litigation. In such a case the statute makes it the imperative duty of a justice to grant an amendment upon proper terms. § When a power is conferred by statute for the promotion

* King v. Brown, 2 Hill, 485; Lisk v. Sherman, 25 Barb., 435; Baldwin v. Palmer, 10 N. Y., 232.

† Abbott v. Draper, 4 Den., 51; 10 N. Y., *supra*.

‡ Code, § 64, sub. 10; Wait's Law and Pr., 408 *et seq.*; Conaughty v. Nichols, 42 N. Y., 83. § Code, § 64, sub. 11.

of justice, suitors have a right to insist upon the exercise of it in a proper case. It is not wholly discretionary. The word *may*, in such a statute, means *shall*.*

It is claimed that this error is not before us, because it is not specified in the notice of appeal. The opinion of the court below shows that it was passed upon there. It is in the record before us. The statute requires the County Court to render judgment upon the *whole case*, without regard to technical errors or defects.†

The judgment of the County Court and of the justice must be reversed, with costs.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Ordered accordingly.

IN THE MATTER OF THE APPLICATION OF THE SYRACUSE,
BINGHAMTON AND NEW YORK RAILROAD COM-
PANY, TO ACQUIRE LANDS.

Chap. 140 of 1850 — 237 of 1869 — General Railroad act — land taken under — when proceedings may be discontinued — costs on such proceedings — chap. 270 of 1854.

Under the provisions of the general railroad act (chap. 140 of 1850, and chap. 237 of 1869), relative to the taking of land for the railroad company, there is no obligation imposed on the company to take land until the confirmation of the report of the commissioners appointed to assess the damages.

Up to this point in the proceedings, the court has power on the application of the company to discontinue the proceedings; the act, chapter 270 of 1854, authorizes the awarding of costs in proceedings under the general railroad act. *Rensselaer, etc., R. R. Co. v. Davis* (55 N. Y., 145) followed.

APPEAL by certain owners from an order made at Special Term, declaring that the proceedings taken on the part of the railroad company to acquire their lands were thereby abandoned and discontinued, and that such owners recover their witness fees and other taxable disbursements on such proceedings, and \$150 extra

* *Macdougall v. Patterson*, 11 C. B., 772; *Mayor v. Furze*, 3 Hill, 612.

† Code, § 386.

allowance against said company; and by said company from that part of the order which awards costs and an allowance.

H. Burdick, for the contestants.

Wm. J. Wallace, for the railroad company.

GILBERT, J.:

Appeal by certain owners from an order made at Special Term, October 28, 1873, declaring that the proceedings taken on the part of the railroad company to acquire their lands, were thereby abandoned and discontinued, and that such owners recover their witness fees and other taxable disbursements in such proceedings, and \$150 extra allowance against said company; and by the company from that part of the order which awards costs and an allowance.

This company was incorporated pursuant to the general railroad act of April 2, 1850, and the proceedings to acquire land, referred to, were taken under the provisions for that purpose contained in that act and in the amendatory act of April 17, 1869. Commissioners of appraisement were duly appointed, and made a report which bears date July 26, 1873. This report was not presented to the court for confirmation, but, on the 18th of August, 1873, the company notified said owners, in writing, that said proceedings from that date would be, and thereby were, abandoned by said company. The provisions of the acts of 1850 and 1869, before referred to, relating to this subject, confer upon railroad corporations the right to acquire lands, compulsorily, and prescribe the manner in which that right shall be exercised. Among these regulations is that contained in the seventeenth section of the act of 1850, which provides that, upon the report of the commissioners being made, *the company* shall give notice to the parties to be affected by the proceedings, according to the rules and practice of the court, for the confirmation of the same, and that thereupon the court shall confirm such report. The eighteenth section provides that the order of confirmation shall be recorded, and that thereupon and on the payment or deposit by the company of the sums to be paid as compensation for the land and for costs, counsel fees and expenses, *as aforesaid*, as directed by said order, the interest

sought to be acquired in the land shall vest in the company. Although the language of the seventeenth section is imperative, yet its sole object being to declare one of the terms or conditions on which the company might acquire the land, no absolute duty to perform the condition was imposed. The statute left it optional with the company to perform the condition, or renounce the right. It is only upon the confirmation of the report of the commissioners, that the claim of the owners to the damages awarded to them accrues; and, as already stated, there is no obligation imposed on the company to take the land before that event. Until mutual interests have become vested by the confirmation of the report, the proceedings resemble a negotiation between the parties, which must be consummated in the manner provided by the statute, before either acquires any vested rights against the other.*

We are of opinion that the proceedings were effectually discontinued by the notice. No doubt the court had power to make the order of discontinuance as an incident to the authority conferred upon it; and it was a very proper act to be done, although it was not absolutely necessary to protect the owners. But we have not been able to find any authority for granting costs to the owners. The only provision of the general railroad act on this subject is that contained in the sixteenth section, which requires *the commissioners* to determine what sum ought to be paid to the general or special guardian or committee of an infant, idiot or person of unsound mind, or to the attorney of an unknown owner, for costs, expenses and counsel fees. These are evidently the costs, expenses and counsel fees, referred to in the eighteenth section before mentioned. The court can exercise no power in these proceedings except such as is expressly given to them.† The case of *Hud. R. R. Co. v. Outwater* ‡ is not applicable, for the reason that the charter of the company in that case provided for the allowance of costs and expenses to owners indiscriminately. § Nor does the act of 1854, in relation to special proceedings, apply to the case. It is

*Corp. of N. Y. v. Mapes, 6 Johns. Ch., 48; People v. Brooklyn, 1 Wend., 318; Re Anthony Street, 20 id., 618; Re Wall Street, 17 Barb., 642; Balt. and Sus. R. R. Co., v. Nesbit, 10 How. (U. S.), 395; Hill v. Coms. of Worcester, 4 Gray, 414.

†Alb. and North R. R. Co. v. Cramer, 7 How., 164.

‡3 Sandf. 690.

§ Laws 1846, chap. 216, § 10.

no doubt a special proceeding, but it is governed wholly by the general railroad act. That statute forms a separate and complete system independently of the provisions in general statutes. In *N. Y. Cent. R. R. Co. v. Marvin*,* the Court of Appeals held such a proceeding to be a special creation of the statute designed to form a complete system of itself, entirely independent of the general provision of the Code,† which authorizes an appeal to that court from a final order affecting a substantial right, made in a special proceeding. The act of 1854 was not designed to interfere in any way with that system. This is evident from the provisions of the first section. That allows an appeal from any order made at Special Term. The general railroad act ‡ requires the court to make an order confirming the commissioners' report in the first instance, and then authorizes either party to appeal to the Supreme Court from the commissioners' report (not from the order of confirmation thereof), and provides that such appeal may be heard at a Special or General Term; that, on the hearing thereof, the court may direct a new appraisal, and makes the second report final and conclusive without any order of confirmation. It cannot be supposed that the legislature intended, by the general provision contained in the act of 1854, to give an appeal from the order of confirmation, in addition to that from the report of the commissioners, or an appeal to the General Term from the order made at Special Term on a hearing of an appeal from the report of the commissioners. Such a construction would be absurd. The specific provision for the payment of costs contained in the general railroad act, necessarily excludes all other costs, and any other mode of ascertaining the amount thereof, except the award of the commissioners. The view we have taken of the subject is sustained by several decisions of the Court of Appeals, besides the case of *N. Y. Central R. R. Co. v. Marvin*, before cited. §

We are clear, that in any event the extra allowance was unauthorized. We can discover no principle on which it can be brought within the provisions of the Code on that subject. If the proceeding be a "case," within the meaning of section 309, it

* 1 Kern., 279.

† Sec. 11, sub. 3.

‡ Sec. 18.

§ Re Canal and Walker Streets, 2 Kern., 406; *King v. The Mayor*, 36 N. Y., 182; *Re Dodd*, 27 id., 629.

is not a difficult or extraordinary one, nor has a defense been interposed, or a trial had.

Since the foregoing was written, our attention has been called to the case of *The Rensselaer, etc., R. R. Co. v. Davis*,* wherein the Court of Appeals held, that the act of 1854 authorized the awarding of costs in proceedings under the general railroad act.

We can therefore only modify the order appealed from, by striking therefrom the extra allowance, instead of reversing it altogether.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Ordered accordingly.

SOLOMON L. SIMPSON, APPELLANT, v. THOMAS F. BURCH.

JOHN CLARK AND OTHERS, RESPONDENTS, v. THE SAME.

Chap. 511 of 1853, and chap. 212 of 1863—order of substituted service—what affidavit sufficient—Code, § 189—Attachment—omission to serve summons within thirty days after issuing of.

An affidavit of the sheriff stating that he had made diligent and proper efforts to serve the summons upon the defendant by going to his place of business and residence, but that he could not be found in this State, is sufficient to authorize the county judge to order a substituted service, pursuant to chapter 511 of 1853, as amended by chapter 212 of 1863.

Collins v. Campfield (9 How., 519); *Foot v. Harris* (2 Abb., 454) distinguished.

The omission to serve the summons within thirty days of the allowance of an attachment, entitles the defendant to avoid all proceedings after the issuing thereof, but does not render such proceedings void as against third persons.

Waffle v. Goble (58 Barb., 517); *Taddiken v. Cantrell* (8 S. C. [1 Hun], 710) distinguished.

APPEAL from an order denying a motion to set aside and vacate the judgment in the above entitled action, on the ground that the court acquired no jurisdiction thereof.

The action was commenced by the issuing of a summons. The defendant could not be found, and the summons was served pur-

* 55 N. Y., 145.

FOURTH DEPARTMENT, APRIL TERM, 1875.

suant to an order granted by Hon. C. WHITNEY, county judge, under the act of 1853, providing for a substituted service. A warrant of attachment was duly issued and served. Judgment was entered August 20, 1874. Solomon L. Simpson subsequently obtained a judgment against the same defendant, and made the motion to vacate and set aside the judgment of Clark & Co.

C. H. David, for the appellant.

Howe & Rice, for the respondent.

GILBERT, J.:

The plaintiffs have recovered a judgment in this court against the defendant, on which an execution has been issued, and a levy made upon his goods. Mr. Simpson, a junior creditor of the defendant, by a judgment upon which an execution has been issued to the same sheriff, moved at Special Term for an order vacating and setting aside the judgment and execution of the plaintiffs, on the ground that the court acquired no jurisdiction of the defendant. It appears that the defendant was not served personally, but that an order was made by the county judge of Oswego county, where the venue was laid, for a substituted service, pursuant to the act of 1853,* to facilitate the service of process in certain cases, as amended in 1863.† The order was made upon an affidavit of the sheriff of Oswego county, stating that he had made diligent and proper efforts to serve the summons upon the defendant, by going to his place of business and residence, but that he could not be found *in this State*.

It is objected that the affidavit does not show that the sheriff made diligent and proper efforts to serve the summons personally, or that the defendant could not be found. We think the affidavit was sufficient to authorize the county judge to make the order. The evidence presented to him was competent, and tended to prove the facts on which his authority to issue the order depended. Nothing more is required.‡ It is urged that the statement that the defendant could not be found *in this State* vitiated the affidavit.

* Chap. 511.

† Chap. 212.

‡ *Miller v. Brinkerhoff*, 4 Den., 118; *Staples v. Fairchild*, 8 Comst., 41; *Skinion v. Kelley*, 18 N. Y., 355; *Collins v. Ryan*, 32 Barb., 648.

The answer is, that it was some evidence to prove that the defendant could not be found anywhere, within the meaning of the act of 1853. Whether it was sufficient to satisfy the county judge or not was for that officer to decide. In *Collins v. Campfield*,* and *Foot v. Harris*,† the affidavit on which the order was made showed where the defendant might be found out of the State. When such a fact appears in the affidavit, it is proved affirmatively that the defendant can be found, and the order should not be made. Those cases are clearly distinguishable from this.

As against the present applicant, we think the attachment proceeding is sufficient to uphold the judgment. Section 139 of the Code expressly conferred jurisdiction of the action from the time of the allowance of the attachment. The omission to serve the summons personally or by publication within thirty days afterward, was an irregularity which entitled the defendant to avoid all proceedings after the issuing of the attachment. But such omission did not render the proceedings void as regards third persons. The defendant undoubtedly might waive the effect of such omissions, and that is the test whether the defect shown is a nullity or a mere irregularity.‡ Upon this ground, we think the case of *Gere v. Gundlach*§ was rightly decided. In *Waffle v. Goble*,|| and *Taddiken v. Cantrell*,¶ the defendant, and not a third person, was the moving party. For that reason, those cases are not authority for the position assumed by the applicant here.

The order should be affirmed, with costs.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Order affirmed, with ten dollars costs.

*9 How., 519.

†2 Abb., 454.

‡Clapp v. Graves, 26 N. Y., 418; Bascom v. Smith, 31 id., 595; Reinmiller v. Skidmore, 7 Lans., 161; affirmed in Court of Appeals, January, 1875.

§57 Barb., 18. ||53 Barb., 517. ¶4 N. Y. S. C., 223; S. C., 1 Hun, 710.

MARTIN J. VINCETT, RESPONDENT, v. CHRISTIAN COOK,
APPELLANT.

*Negligence — owner of dilapidated building adjoining highway — duty and liability of —
Evidence.*

An owner of land which adjoins a public street in a populous city, who suffers a building to remain thereon in an unsafe or dilapidated condition, is liable to a party sustaining damages by the falling of the wall of such building, although the fall of the wall may have been the result of a storm of unusual violence. Failure on the part of the owner of a building to keep it in a safe condition, and resulting damages, throw upon the owner the burden of showing that the building was safe so far as diligent examination would show.

APPEAL from a judgment in favor of plaintiff, entered on the verdict of a jury, and from an order denying a motion for a new trial.

A wall of defendant's building was blown over by a strong wind upon the plaintiff, who was passing along the street, and this action was brought to recover damages for the injury sustained by the plaintiff thereby.

Fuller & Vann, for the appellant. The owner of a building is not an insurer of its safety. The law requires of him simply ordinary care and vigilance. (*Shearman and Redfield on Negligence*, § 498; *Wharton on Negligence*, §§ 26, 415.) The only principle by which the defendant can be held liable at all in this action, is, that it is negligence to permit things to remain near a highway in such a manner that in the natural course of events they may fall and injure persons lawfully passing. (*Wharton on Negligence*, § 839; *Hunt v. Hoyt*, 20 Ill., 544; *The Rector, etc., of the Church of the Assumption v. Buckhart*, 3 Hill, 193.) But the law does not award damages for the consequences of a lawful act performed in a lawful manner, nor from injuries which result from accident, or which could not be prevented by ordinary human care. (*Livingston v. Adams*, 8 Cow., 175; *Williams v. N. Y. Central R. R. Co.*, 18 Barb., 222, 247; *Clark v. Foot*, 8 Johns., 421; *Panton v. Holland*, 17 id., 92, 99; *Radcliff v. Mayor of Brooklyn*, 4 N. Y., 106, 200; *Crofts v. Waterhouse*, 3 Bing., 319.) Nor can a man be held responsible for failing to prognosticate

natural casualties, such as are called the acts of God. (Wharton on Negligence, § 416, and cases cited; *Price v. Hartshorn*, 44 Barb., 655; *Merritt v. Earle*, 29 N. Y., 117.) Nor for ignorance of facts which ordinary diligence could not have discovered. (Wharton on Negligence, §§ 26, 415.)

Hiscock, Gifford & Doheny, for the respondent. The old and well established maxim, *sic utere tuo ut alienum non lædas*, is especially applicable to owners of real estate, particularly in cities and adjoining highways, and has been expressly or in effect asserted by the courts in numerous decisions. (*Althorff v. Wolfe*, 22 N. Y., 355; *Benson v. Suarez*, 43 Barb., 408.) As having a covered coal hole or other excavation in the sidewalk. (*Anderson v. Dickie*, 26 How., 105, 117; *Congreve v. Smith*, 18 N. Y., 79, 84.) Building and bridging a race-way across a highway, and failing to keep such bridge perfectly safe to travel over: held, one sustaining injuries thereby, without gross neglect, was entitled to recover, even though such builder had used the utmost care to prevent such injury. (*Dygert v. Schenck*, 25 Wend., 446; *Barton v. City of Syracuse*, 39 N. Y., 54.) A traveler merely detained in a highway, by a fence across the same, may recover his damages of detention from him who so caused it. (*Pierce v. Dart*, 7 Cow., 609.) So the owner of horses, whose servant leaves them unhitched in the street, is liable to him against whom they run for his injuries thereby. (*Morris v. Kohler*, 41 N. Y., 42, 46.) And he who is injured by a collision in a highway may recover, if he used ordinary care to avoid it, unless it be shown in defense to have been done by inevitable accident, or that the defendant was without blame, and the injury he caused unavoidable. (*Center v. Finney*, 17 Barb., 94; *Qurmian v. Bennett*, 6 M. & W., 499, 510; *Leame v. Bray*, 3 East, 593; *Castle v. Duryee*, 2 Keyes, 169; *Jetter v. N. Y. and Harlem R. R. Co.*, id, 174; *Guelle v. Swan*, 19 Johns., 381.) It cannot be reasonably claimed that he who travels in the streets of a city must critically examine and constantly watch the tops of the walls of the adjoining buildings, and determine and avoid them if unsafe, or be held guilty of negligence and not entitled to recover in an action like this; because, in thus directing his attention upward, he might fall into some excavation beneath him and receive injury, and

so, for want of watching in that direction, be held not entitled to recover for such injury. This respondent had a right to assume that appellant would maintain this building and wall as required by the law of the land. Every owner of real property and buildings is presumed to know in what way to make such buildings safe against all ordinary winds, and is also bound to know enough to keep the same in such condition as to prevent injuries thereby to others. (*Benson v. Suarez*, 43 Barb., 408; *Qurman v. Bennett*, 6 M. & W., 499, 510; *Morris v. Kohler*, 41 N. Y., 42.) And want of mental capacity is no defense to actions for personal injuries. (*Bullock v. Babcock*, 3 Wend., 391, 394.)

GILBERT, J.:

We perceive no cause for disturbing this judgment. The liability of the defendant depended solely upon questions of fact. These were determined by the jury upon instructions as to the law, which appear to us to have been quite as favorable to the defendant as the evidence warranted. Upon a well established principle, therefore, the verdict must be held to be conclusive. Upon the merits, also, the case is clear. An owner of land which abuts on a public street in a populous city, who suffers a building to remain thereon in an unsafe or dilapidated condition, is not exempted from liability for an injury to a person lawfully using the street, which injury was occasioned by a part of the building being detached from the rest by a storm, and falling upon him, because the storm was one of unusual violence. It was, no doubt, lawful for the defendant to erect the building in question, and to keep it where it stood. A man has an absolute right to use his own property as he pleases for all the purposes to which that kind of property is usually applied, and this right cannot be interfered with so long as it is not a nuisance. A building adjoining a highway, which is in such a condition as to endanger the safety of persons passing along it, is a nuisance. The law casts upon the owners of buildings so situated the duty of preventing their being or becoming dangerous to persons lawfully passing along the highway. Failure in such duty, and resulting damage, furnish *prima facie* evidence of negligence by the maxim *res ipsa loquitur*. The burden was thus cast upon the defendant of proving that the build-

ing, at the time of the accident, was safe, so far as diligent examination would show. On this point there is no room for argument against the verdict of the jury.* There is not the slightest proof of any contributory negligence on the part of the plaintiff that we can discover, and no testimony tending to prove it has been pointed out.

We are inclined to think the question put to the witness Soule, viz.: "What was the condition of that wall; was it safe, or otherwise," was not improper. It did not necessarily call for the opinion of the witness, but for the result of his actual observation. Matters of common observation may ordinarily be proved by those who witness them. It certainly did not require an expert to tell whether a building, in the condition this was, was safe. But the exception is unavailing, because no ground of objection to the testimony was stated. Where the objection is to the mode of proving a fact, and not to proof of the fact itself, it must be distinctly placed upon that ground so that the opposite party may obviate the objection by proving the fact in a legal manner. With respect to the other objections, it is only necessary to say, that we have examined all of them and find in them nothing worthy of remark.

The judgment must be affirmed.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment affirmed.

WILLIAM G. BUTLER, RESPONDENT, v. THE CITY OF
ROCHESTER, APPELLANT.

Chap. 262 of 1859 — presentation of claim to common council — when a compliance with requirements of — costs.

A presentation of a claim against a municipal corporation to the common council thereof, is a sufficient compliance with chapter 262 of 1859, especially when

* *Kearney v. Lond. B. and S. Railway Co.*, L. R. (5 Q. B.), 411; *Scott v. Lond. Docks Co.*, 3 H. & C., 596; *Fletcher v. Rylands*, L. R. (1 Exch.), 279; S. C., 3 Hof. L., 339; *Worster v. Forty-second Street R. R. Co.*, 50 N. Y., 203; *Dygart v. Schenck*, 23 Wend., 447; *Whart.* on Neg., §§ 839 to 844.

the corporate powers are so distributed that the officer, who, from his duties, might be assumed to be the chief fiscal officer of the corporation, has no power to pay the claim if presented to him. •

THIS is an appeal by defendant from an order made by Judge DWIGHT at the Monroe Special Term, denying a motion for retaxation of costs.

The defendant claimed that the demand upon which the above snit was brought, should have been presented to the city treasurer for payment before suit brought.

The plaintiff claims that a presentation of the demand to the common council of defendant was proper, and that it was not necessary to present it to the city treasurer. The referee found that the demand was presented to the common council of defendant before suit brought and was refused.

James Breck Perkins, for the appellant.

John W. Kelly, for the respondent.

GILBERT, J.:

The intention of the legislature in enacting the statute, chapter 262 of 1859, is manifest. It was to prevent the recovery of costs against municipal corporations, in cases where the creditor had not afforded the corporation an opportunity to pay before bringing his action. That opportunity was given in this case. The claim was presented to the common council, who alone could authorize its payment, and it was rejected. The treasurer is a subordinate officer. The relation between him and the common council, in matters of this kind, resembles that of an agent to his principal, and a presentation to the higher authority is equivalent to one to the lesser. The presentation of the claim to the treasurer, after the common council had refused to pay it, would have been an idle ceremony. The statute does not require a supererogatory act. Its language is, that the claim must be presented *for payment*. If the treasurer was the chief fiscal officer, he was not authorized to pay. He was not therefore the officer whom the statute, upon a fair construction, designated. For, when the corporate powers have been so distributed that the officer who, from his duties, might be

regarded as the chief fiscal officer, has no authority to pay a creditor when his claim is presented, he is not such an officer within the meaning of the statute.*

The order appealed from should be affirmed, with costs.

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Order affirmed, with ten dollars costs.

JOHN ORTNER, PLAINTIFF IN ERROR, v. THE PEOPLE OF
THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

Perjury in affidavit annexed to claim against municipal corporation — what must be averred in indictment for.

A prisoner was convicted of the offense of willfully and corruptly swearing false in an affidavit made for the purpose of obtaining audit of an unliquidated claim against the city of Buffalo, pursuant to the statute, which statute makes false swearing in an affidavit authorized by the act perjury. It was not averred in the indictment that the affidavit was authorized by the charter, or that it was made for the purpose required thereby, or that the claim to which it was appended was ever presented to the common council for audit. *Held*, that the indictment was fatally defective.

WRIT of error to the Court of Sessions in and for the county of Erie. During the trial a motion was made to quash the indictment for the reasons stated in the opinion, which motion was denied.

Lewis & Gurney, for plaintiff in error. The indictment is bad for not alleging that it was necessary for Ortner to make this affidavit in order to collect his demand for repairing the outlet to the Georgia street sewer. This must appear from the indictment. (*The People v. Gaige*, 1 Green Ch., 524; *People v. Allen*, 5 Denio, 76; *Dawson v. The People*, 25 N. Y., 399.) If it was not necessary to make the affidavit, then it is extra-judicial and lays no foundation for perjury. (*U. S. v. Babcock*, 4 McLean, 113; *The People v. Jacob Travis*, 4 Parker Cr., 213; *Com. v. Pickering*, 8 Gratt., 628; *State v. Ellison*, 8 Blackf., 225; *Williams*

**McClure v. Supervisors*, 50 Barb., 594; S. C. in Court of Appeals, 4 Abb. (N. S.), 202.

v. *State*, 7 Humph., 47.) The forms of indictments for perjury upon affidavits, require an allegation that the party who administered the affidavit had authority so to do. (1 Archb. Crim. Pl. and Ev. [Lond. ed.], 566, 567; 2 Bishop on Criminal Procedure, §§ 844, 845, 846.) The indictment must proceed by particular averments to negative the allegations charged to be false, and must show the defendant guilty of the offense charged. (2 Archbold Cr. Pl. and Pr., 965, note; *State v. Bishop*, 1 Chipman [Vt.], 120; *Dodge v. The State*, 4 Zab., 455.) The indictment must state all the facts necessary to make the defendant guilty of the offense charged, and if it does not do that, it is bad in substance. The indictment in this case does not show the defendant guilty of any offense punishable by law, and cannot be helped by an intendment, inference or guess. (*People v. Allen*, 5 Denio; *Dawson v. The People*, 25 N. Y., 399; Wharton's Am. Crim. Law, § 379 [6th ed.]; *Reynolds v. The State*, 2 Nott & McCord, 365; *State v. Barber*, 18 Vermont, 195; *State v. Keen*, 34 Maine, 500; *State v. Godfrey*, 24 id., 232; *Metzer's Case v. Hill*, 5 Gratt., 682; *State v. Foster*, 11 Iowa, 291.) The writ of error in this case brings up all the questions we here seek to review. (3 R. S., pp. 1033 to 1036; *People v. Blakely*, 4 Parker Cr., 176.) The rule in regard to granting new trials upon the ground of newly discovered evidence, is the same in criminal as in civil cases. (1 Graham & Waterman on New Trials, 481.)

Benjamin H. Williams, district attorney. The granting of a motion to quash is discretionary with the court, and error does not lie for its refusal. (Wharton's Crim. Law, 519; *Com. v. Eastman*, 1 Cush., 189; *State v. Putnam*, 38 Maine, 296; *Lambert v. People*, 7 Cow., 535.) The indictment is sufficient. The perjury consisted in swearing false in an affidavit authorized by section 7, of title 3, of the charter of the city of Buffalo. (Chapter 519 of Session Laws of 1870.) That section requires claims against the city of Buffalo to be made out in a certain form, and that they shall not be received for audit unless made out in such form, and accompanied by the affidavit prescribed in said section. It was not necessary to show that the city or any person had been defrauded. (*King v. Crossly*, 7 T. R., 351; 1 Hawk. P. C., 69, § 9.) It was not

necessary that the law should have required Ortner to make the affidavit for the purpose of collecting his claim. It is sufficient if the affidavit was one authorized by the charter of the city. (Charter of Buffalo, title 16, § 11; chap. 519, Session Laws of 1870.) It is sufficient to allege the substantial and specific facts constituting the perjury. (*Tuttle v. People*, 36 N. Y., 431; *People v. Phelps*, 5 Wend., 9; *People v. Warner*, id., 271; *People v. Tredway*, 3 Barb., 470; 2 Chitty Crim. Law, 307; *Campbell v. People*, 8 Wend., 636.) If the indictment contains the substance of the offense, and informs the defendant of the allegations against him, it will be upheld. (5 Wend., 20; 8 Barb., 552; 22 N. Y., 150; 2 Rev. Stat., 720, § 52; *King v. Dowlin*, 5 T. R., 318.)

GILBERT, J. :

The gist of the offense of which the prisoner was convicted, consists of willfully and corruptly swearing false, in an affidavit made for the purpose of obtaining an audit of an unliquidated claim which he had against the city of Buffalo, by the common council of that city, pursuant to section 7 of title 3 of the charter thereof. That section prohibits the common council from auditing any such claim, unless it be made out in detail, with certain prescribed specifications, nor unless accompanied by an affidavit that the claim and the items and specifications thereof, are in all respects just and correct.* Section 11, of title 16, provides, that every person who shall willfully and corruptly swear false to any material fact in *any affidavit authorized by the act*, shall be guilty of perjury.

It is not averred in the indictment, that the affidavit was authorized by the charter, nor that it was made for the purpose required by section 7 of title 3, nor that the claim to which it was appended was ever presented to the common council for audit. The averment is, that the prisoner caused his bill to be presented to Mr. Ditto, the engineer, and that he made the affidavit before Mr. Pierce, who was a commissioner of deeds and a clerk in the office of the engineer. But it is not averred that it was any part of Mr. Ditto's duties to receive the bill, or that he in fact received it for any purpose connected with an audit. Without the averments omitted, or equivalent ones sustained by proof, the offense would

* 2 Laws 1870, 1179, § 7.

not be made out; for if the affidavit was made for any other purpose than that of obtaining an audit of the claim, and was misapplied, it was not authorized by the charter, and perjury could not be assigned upon it under section 11 of title 16. It is a familiar rule, that if the indictment does not set forth the facts requisite to constitute the offense charged, a conviction upon it must be reversed.

The provisions of the Revised Statutes which define the crime of perjury, * cannot be applied to the case. It would not, under any circumstances, fall under subdivision 1 of that section. It might possibly fall under subdivision 2, if the indictment contained an averment that the affidavit was necessary in the prosecution of a private right of the prisoner. But the indictment does not show that fact. The learned district attorney replied to the objection that the indictment was defective, by referring us to the third subdivision of that section, which applies to a case where any oath may be lawfully required by any administrative officer. There are three answers to this: First. The oath was not in fact required, but was made voluntarily; nor does it appear that Mr. Pierce, who took the affidavit, was authorized by the common council, or that it was his duty as a city officer, to make such a requisition; or that there is any law conferring such authority upon him. Second. It could not lawfully be required, but it was optional with the prisoner whether he would make the affidavit, or forego the audit of his bill. Verifying it without the purpose of having it presented for audit, would not be an offense. Third. The administrative officers, referred to in subdivision 3, are those enumerated in title 5 of chapter 5, part 1, of the Revised Statutes, and Mr. Pierce's functions do not bring him within that class, for he was not an administrative officer of any sort, but a clerk only in the office of the engineer.

We are satisfied that the indictment is insufficient, and for that reason the conviction must be reversed; and, as no conviction can legally be had upon it, the prisoner must be absolutely discharged. †

Present — MULLIN, P. J., SMITH and GILBERT, JJ.

Judgment reversed, and prisoner discharged.

* 2 R. S., 681, § 2.

† 2 R. S., 741, § 24.

GEORGE W. NICHOLAS AND AMOS A. NEWSON, RESPONDENTS, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, APPELLANT.

Common carrier — when contract sufficient to exempt from liability for negligence.

Where the plaintiff, at the time of shipping certain quince trees, released the defendant from all liability for "damage to perishable property of all kinds, occasioned by delays from any cause, or change of weather * * * or loss or injury by fire or water, heat or cold:" *held*, that the defendant was not liable for the damage caused by the freezing of the trees, though such freezing occurred through its own negligence.

APPEAL from an order made at Special Term, denying a motion for a new trial, in an action tried at the Ontario Circuit in February, 1873, where a verdict was rendered in favor of the plaintiffs.

The action was brought to recover damages for the loss of a quantity of quince stock, claimed to have been destroyed by frost through the negligence of the defendants. The stock was shipped in New York, March 4, 1872, and consisted of fifteen cases of trees delivered to the company on the said fourth of March, and arrived at Geneva, the place of destination, on the twelfth of the same month. The proofs show that a heavy snow-storm began on the said fourth of March, and continued for several days thereafter, blocking up the defendant's road westwardly of Utica, and at Syracuse particularly, accompanied by very cold weather. When the property was delivered at the defendant's depot, in New York, the plaintiff executed an instrument of release which recited the fact of the said shipment, and released the defendants, among other things, from all liability for any loss or "damage to perishable property of all kinds, occasioned by delays from any cause or change of weather;" also, for "breakage or chafing, or loss or injury by fire or water, heat or cold."

At the close of the evidence the defendant's counsel asked the court to nonsuit the plaintiff on the ground that, by the terms of the said contract, the defendant was absolutely discharged from the claim of damages mentioned in the complaint, irrespective of the question as to whether it was occasioned by the neglect of the defendant or otherwise, and also asked the court to direct a verdict

for the defendant on the same ground, which motions the court denied respectively, and the defendant's counsel duly excepted.

The case was submitted to the jury, who found a verdict for the plaintiff for \$2,000 damages.

The defendant's counsel excepted to the charge upon the same ground stated in the motion for a nonsuit, and moved for a new trial at Special Term, which was denied.

E. G. Lapham, for the appellant. The release in question exempted the defendant from liability for want of ordinary care. (7 Alb. L. J., p. 15, citing 27 L. T. R.; also p. 10 of same vol.; 42 Barb., 102; *French v. R. R. Co.*, 4 Keyes, 108; *Keeny v. R. R. Co.*, 59 Barb., 104; *Cragin v. R. R. Co.*, 51 N. Y., 61.)

Theodore Sill, for the respondents. The alleged release does not extend to negligence of the defendant, its servants or agents. (Alb. L. J., Dec. 13, 1873, pp. 371, 372, and cases there cited; 44 Barb., 665; 25 N. Y., 442; 1 Kern., 485; 24 N. Y., 222; Alb. L. J., May 30, 1874, p. 357; id., Nov. 15, 1873, and cases there cited.)

E. DARWIN SMITH, J.

The issue submitted to the jury was, simply, whether the loss of the plaintiff's quince stock was caused by the defendant's negligence. The judge stated to the jury that the gist of the action was the alleged negligence of the defendant, and that if they came to the conclusion, in view of all the evidence, that the freezing — the injury to the trees — was the result of neglect — of the want of due care on the part of the employes of the railroad company, the plaintiff was entitled to recover. No complaint is made that the judge did not direct or allow the jury to take into consideration all the facts relating to the snow-storm and the extreme cold weather accompanying the same, so far as such facts furnished an excuse for delay in the delivery of said property and repelled the charge of negligence. The verdict of the jury must therefore be deemed a conclusive finding against the defendant on the issue of negligence.

The only question for our consideration is, therefore, the same raised, discussed and decided at the Circuit: whether the instru-

ment of release, executed by the plaintiff, includes this question of negligence, and discharges the defendant from all loss and damages consequent therefrom.

It is well settled in this State and country that a common carrier may, by express contract, limit his common-law liability as an insurer, in respect to property received by him for transportation, as against all loss and damage, however occasioned, except as against his own personal negligence or fraud. The cases in this State which assert and sustain this doctrine * have recently been reviewed and considered in the United States Supreme Court, in the case of *Railway Company v. Lockwood*,† in an elaborate opinion by Judge BRADLEY, in which he questions the soundness of these cases so far as they allow the carrier to exonerate himself by contract for his own negligence or that of his servants. If the courts of this State have erred in relaxing too far the rule of the common law on this point, they have done so in a large degree from respect to the decision of the Supreme Court of the United States, in the case of the *New Jersey Steam Navigation Co. v. Merchants' Bank*,‡ which they have generally followed and regarded, as it is, the leading case on this subject. The cases of this State have uniformly held that a contract of a carrier, exempting himself from liability for loss or injury in the carriage of goods, should not be deemed to include negligence by any general words, nor unless the contract, in clear and explicit terms, embraces negligence. In this particular, too, they have followed the case of *New Jersey Nav. Co. v. Merchants' Bank*,§ in which Judge NELSON said: | "If it is competent at all for a carrier to stipulate for the gross negligence of himself and his servants or agents in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties." The release in this action, set up by the defendant, does not, by its terms, embrace negligence, or purport to discharge the

* To wit: *Dorr v. The New Jersey Steam Nav. Co.*, 1 Kern., 485; *Parsons v. Monteath*, 13 Barb., 853; *Welles v. N. Y. C. R. R. Co.*, 26 id., 641; S. C., 24 N. Y., 184; *Smith v. Same*, 29 Barb., 132; 24 N. Y., 222; *Bissell v. Same*, 29 Barb., 602; S. C., 25 N. Y., 442; *Poucher v. Same*, 49 N. Y., 263; *Perkins v. Same*, 24 id., 196, and others.

† 17 Wall., 366.

‡ 6 How. (U. S.), 384.

§ *Supra*.

| Page 333.

defendant from loss or damage caused by or resulting from the negligence of the defendant, its agents or servants. The question, therefore, arising upon such release, is, whether it does not necessarily embrace negligence to give it any real or practical effect. It must do so, as Judge NELSON states the rule, "in terms that would leave no doubt as to the meaning of the parties." In the said instrument of release, the plaintiff, in express terms, "releases the defendant from liability for loss or damage to perishable property of all kinds, occasioned by delays from any cause, or change of weather;" also, for damages or loss from "breaking or chafing, or loss or injury by fire or water, heat or cold." The loss or damage in this case was clearly occasioned by "*delays*," by change of weather, and by *cold*. All three of these elements or causes of loss and damage, are expressly mentioned in the release, and are particularly and expressly released and discharged. It is difficult to give any force to these terms in the release, which shall leave the defendant liable for negligence from such causes. The property was perishable. The defendant, in respect to such property, would not be liable at common law for loss by heat or cold, unless it or its servants were guilty of some negligence in its care or dispatch. For mere delay in its transportation, the defendant is discharged. This was really the only ground of complaint, and would constitute the only basis for a cause of action, independent of this release. While these trees were in the process of transportation by the carrier, they were injured and destroyed by *cold*—by change and severity of *weather*. This was an act of God, against which the defendant could not guard, and in respect to which it was not responsible. The case seems to me to fall completely within the rule asserted in *Orajin v. The New York Central R. R. Co.** In that case the contract stipulates, in regard to a lot of hogs transported from Buffalo to Albany by the defendant, "that the defendant should not be liable for any loss or damages which might be sustained by reason of any delays, or in consequence of heat, suffocation or ill effects from being crowded." The hogs, for the loss of which the action was brought, died from the effects of heat, the result of the negligence of the defendant's agents in not watering, wetting, washing and cooling off said hogs

* 51 N. Y., 61.

on the way to their destination. The Commission of Appeals held that, to give any effect to this stipulation, it must be held to be intended to exempt the defendant from negligence, in consequence of which the hogs died from heat. I do not see how the two cases can be distinguished. The damage in this action was the result of *cold*, and, in the case of Cragin, it was the result of heat. The parties must have intended that the release should have some effect. The particular risks are specified in the release, and the contract must be applied to the risks particularly named, and to which the property, at that season of the year when it was made, was especially exposed. The plaintiff stipulated, in consideration that the defendant received and carried such property, liable to extra hazard, at ordinary tariff rates, to release them from the risks in question.

This release should be considered and construed, like all other contracts, in view of the facts existing when it was made. The plaintiffs' quince trees were presented for shipment at the defendant's depot in New York, on the fourth of March. They were perishable property, and were liable to be injured or destroyed by freezing. It was essential, therefore, to their preservation in the then state of the weather, which was very cold and growing colder, that they should be forwarded to their place of destination, where they could be housed and protected, with dispatch. The defendant's agents, understanding these facts as well as the plaintiff, acted in reference to them, and caused the car containing these trees to have attached to it a large card, nailed to the door and marked: "*Perishable property; hurry through. This car must not be detained.*" And, also: "*If this car is disabled transfer the property and hurry forward.*" Also one other large card marked: "*Trees, perishable, hurry through.*" These cards indicate the exigency of the case, as related to said trees, as understood by both parties at the time. With the knowledge that these instructions were thus given, and upon the assumption that they would be observed and obeyed by the agents and employes of the defendant with ordinary care and diligence, the plaintiff might not unreasonably execute the release in question, and take upon himself all the risks attending the transportation of said trees from New York to Geneva. At least, the release was executed by him under these circumstances, and is

before us. We can only hold that it, by its explicit terms, does clearly and necessarily include all negligence committed by the agents and employes of the defendant in the charge and transportation of said property, which occasioned its loss.

If the Supreme Court of the United States is right in the view as stated in one of the conclusions in the case of Lockwood,* that it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants, the law can now only be changed in this State by an act of the legislature, as it has been in England by an act of parliament, passed in 1854, called the railway and canal traffic act.

The order denying the motion for a new trial must therefore be reversed, and a new trial granted, with costs to abide the event.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Order reversed and new trial granted, costs to abide event.

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HIRAM RAY, RESPONDENT, v. HORACE H. ADAMS AND
OTHERS, APPELLANTS.

Judgment — lien of, as against subsequent mortgage — purchase-money mortgage — party advancing money to pay for land under an agreement that it should be secured by mortgage thereon.

One Reese, who held a contract for the purchase of certain land, applied to the plaintiff, whom he already owed \$500, for a loan of \$500 more, to enable him to pay up his contract, agreeing to secure the whole amount, \$1,000, by a mortgage to be executed upon the land as soon as it was conveyed to him. The day after the land was conveyed to Reese he deposited the deed with the plaintiff to hold as security for the \$1,000, and about a year afterward executed a mortgage to him for that amount. The mortgage and deed were recorded the same day. Prior to the date of the conveyance to Reese, one Adams had recovered a judgment against Reese. *Held* (1), that as to the \$500 advanced for the purchase of the land, the lien of the mortgage was prior to that of the judgment; (2), that as to the prior debt of \$500, included in the mortgage, the judgment was entitled to priority.

* 17 Wall., 366.

APPEAL from a judgment for plaintiff at Special Term. The facts found by the court are set out in the case substantially as follows :

The defendant Reese held a contract for the purchase of certain lands in the town of Le Ray, Jefferson county, on which he had paid \$100; and there remained unpaid \$900, which was to be paid before he should be entitled to a deed. In March, 1870, he applied to the plaintiff, Ray, for a loan of \$500, to enable him to pay up the contract. Reese already owed Ray \$500, previously loaned. Ray agreed to make the loan upon condition that Reese would, when he acquired the lands, give him a mortgage on said premises to secure the payment of both sums. Reese took the loan of \$500, and the same was paid toward the purchase-price of said land; and Reese took a conveyance of said land under his contract of purchase, March 1, 1870. The *next day* he placed the deed in the custody of Ray, to hold as security for the \$1,000, and the interest, until the mortgage should be executed. On the 7th day of January, 1871, Reese executed the mortgage, and both the deed and mortgage were recorded on the same day. There was a judgment obtained, and docketed in Jefferson county against Reese, May 3, 1865, for \$132.05, subsequently assigned to the defendant Horace H. Adams. Before the commencement of this action, an execution was issued upon the judgment, and it appears from the testimony of the sheriff, that he advertised this land for sale, but was prevented from selling it by an order of injunction, granted in this action.

This action was brought to foreclose the plaintiff's mortgage, and for a judgment declaring it an equitable lien on said premises prior to the lien of the said judgment. The court decided in favor of the plaintiff, and judgment was entered accordingly.

The defendants' counsel excepted to the decision. He also requested the court to decide that the plaintiff's mortgage, embracing an old debt of \$600, could not be regarded as a purchase-money mortgage, except for the loan of \$500 advanced to pay toward the purchase-price. This the court declined to hold, and the defendants' counsel excepted.

The defendants' counsel insisted that the mortgage could not, in any event, be regarded as a lien precedent to the judgment, beyond

the \$500. The court declined to hold in accordance with defendants' request in this respect, and the defendants' counsel excepted.

F. W. Hubbard, for the appellants.

Levi H. Brown and *M. Ballard*, for the respondent. An agreement for a mortgage is in equity a specific lien on the land. (*In Matter of Howe*, 1 Paige, 125, and cases there cited; 6 Johns. Ch., 402; Story's Eq. Jur., § 790, 791, 792, 793; Willard's Eq. Jur., 567; *Griffin v. Bennett*, 4 Edw. Ch., 673; *In Matter of Howe*, 1 Paige, 125, 129, 130.) By advancing money to pay the purchase-money under the circumstances and agreement, Ray acquired like equities, and his mortgage the same priority as to the general lien of judgments against the vendee, as would the vendor on taking a mortgage on sale to secure payment of purchase-money, at least to the extent of the loan, although Ray's mortgage was not in fact or literally a "purchase-money mortgage." (*Jackson ex dem. v. Austin*, 15 Johns., 477; *Tallman v. Farley*, 1 Barb., 280; *Heywood v. Nooney*, 3 id., 643; *Chase v. Peck*, 21 N. Y., 585; *Lane v. Ludlow*, 6 Paige, 316; *Parker v. Jackson*, 11 Wend., 442.) What, in good conscience, ought to have been done in execution of the agreement to protect the rights of the plaintiff and secure him for money parted with, equity will regard as done. (*In Matter of Howe*, 1 Paige, 125; Willard's Eq. Jur., 47, 298, 299; *Lanning v. Tompkins*, 45 Barb., 308, 316; *Burch v. Newbury*, 1 id., 648, 664.)

MORGAN, J.:

It is very difficult to find any principle in the adjudged cases, upon which the judgment in this action can be sustained. The liens of judgments are declared by statute.* And it is also provided that, "whenever lands are sold and conveyed, and a mortgage is given by the purchaser at the same time, to secure the payment of the purchase-money, or any part thereof, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser."† The same provision was contained in the Revised Laws;‡ and it was decided in *Jackson v. Austin*, § that this preference over a prior judgment is not restricted

* 2 R. S., 359, § 3.

† 1 R. L., 875, § 15.

† 1 R. S. (Edm. ed.), 700, § 5.

§ 15 Johns., 477.

to the case of a mortgage to the vendor of the land; but if the purchase-money be advanced by a third person, to whom the purchaser, *at the same time* that the conveyance is executed to him, executes a mortgage of the same land to secure the money advanced, such mortgage is entitled to the same preference over a prior judgment as the vendor of the land would have had, had the mortgage been executed to him. It was decided that such a mortgage to a stranger for purchase-money, is within the terms of the statute. Under this decision, it is plain that the plaintiff here cannot be regarded as embraced within the terms of the statute giving his mortgage priority, for it was not executed at the *same time* as the conveyance.

As to the *deposit* of the deed with the plaintiff by way of security until the mortgage should be executed, if it should be regarded as an equitable mortgage, it appears that the deposit was not in fact made until the next day after Reese obtained the conveyance; and in the mean time the judgment became a lien prior in point of time to the *deposit* of the deed. That feature of the case may be disregarded entirely, for it is obvious that the subsequent mortgage is just as good as the *deposit* of the deed, to create a lien. Both were subsequent to the conveyance. Indeed, if the mortgage had been executed the same day of the *deposit* of the deed, it would not in any way change the rights of the parties. In either case the lien of the judgment creditor would attach before the deposit of the deed, or the making of the mortgage. It is enough, perhaps, to say of this deposit by way of security, that it is not sufficient to create an equitable mortgage, for it was not an actual, *immediate* and *bona fide* deposit of the title deed with the creditor, when the loan was made.* It may, however, be regarded as some evidence of the agreement to give a mortgage.

It is said, that when the conveyance and incumbrance of the land are *simultaneous*, no opportunity is given for the judgment lien to attach. But it has been held, that if, upon acquiring the land, the judgment debtor immediately executes a mortgage, *not for the purchase-money*, the lien of the mortgage will be subordinate to that of the judgment. Some other reason must be found, therefore, for giving precedence to a purchase-money mortgage,

* 2 Story's Eq. Jur., § 1020.

than that of simultaneousness. Hence it is said that a purchaser who has paid only a portion of the sum contracted to be paid, has no title which is not liable to be subjected to the lien of the vendor for unpaid purchase-money. It is argued that the mortgage for unpaid purchase-money represents an interest in the land, never in fact owned by the incumbrancer; and it is said this gives it precedence over judgment liens of anterior date. *

The statute already cited, seems to recognize the doctrine, that only a simultaneous mortgage for the purchase-money will displace the lien of a prior judgment against the vendor; but courts of equity have long asserted the priority of the vendor's lien for the unpaid purchase-money, as against prior judgment creditors and subsequent purchasers affected with notice. This lien, when it has not been waived, would allow the vendor of land to enforce it for the unpaid purchase-money, as against the prior creditors of the vendee. Nor do I see any reason why the taking of a mortgage subsequent to the conveyance, should place the vendor in a worse condition than he would be in if he had relied upon his implied lien. But no authority can be found, I think, which would allow the vendor in such a case to tack another debt to his mortgage, and make it a lien to take effect prior to a former judgment against his vendee. There is, in my opinion, no ground for holding that a precedent debt, not for purchase-money, can be incorporated into a mortgage so as to displace a prior judgment, even if given simultaneously with the conveyance. The contrary has been held in *Root v. Curtis*. † Much less can it be claimed that such a mortgage, given by the vendee subsequent to the conveyance to him, can operate to defeat the lien of a prior judgment.

The judgment of the Special Term is therefore erroneous, so far as it gives priority to the old debt of \$600. It was not claimed to have been advanced as purchase-money, for only \$100 had been paid on the contract when the \$500 loan was made. There is doubtless more difficulty with the other question, and I do not propose to discuss it at length. It may be unnecessary to decide it, as doubtless the judgment must be satisfied without regard to the lien of \$500. That there is some ground for asserting the priority of

* See Freeman on Judgments, § 373, and cases there cited.

† 38 Ill., 192; and see Freeman on J., § 373; *Dwight v. Newell*, 3 Comst., 185.

lien as to the loan of \$500, will be readily conceded. I have assumed that it might be asserted in favor of the vendor; and perhaps, in case of accident, fraud or mistake, in favor of a stranger who advances the purchase-money upon an agreement of the vendee for a mortgage simultaneously with his obtaining the title. Though the mortgage is not given till long afterward, perhaps a court of equity would regard that as done which was agreed to be done, and at the time it was to be done.* As against judgments which are general and not specific liens on the debtor's estate, the claim of a stranger who has advanced money to the debtor to help him purchase the lands, under an agreement for a mortgage as security on the same lands when obtained, stands upon strong grounds of equity, and unless he has lost his preference by his neglect to take a simultaneous mortgage, there is no reason why he should not be preferred over a prior judgment creditor.† Whether the courts in this State will establish such a doctrine, remains to be seen.

There are decisions which seem to be adverse to extending these equitable liens, or multiplying them so as to embrace doubtful cases.‡ The case of *Griffin v. Burtnett*, § cited by the respondent's counsel, is apparently in favor of the claim to priority as to the \$500 loan. But the vendee in that case worked out his claim through a mortgage to secure future advances for improving the property, which was *prior* in point of time to the judgment. Another person than the mortgagee made the advances upon the security of his mortgage, and he was adjudged to have a prior equity. The mortgage was prior to the judgment, but the moneys advanced were subsequent. Without the aid of this *prior* mortgage, which contemplated these advances, there is no ground of equity stated, upon which the preference could be sustained. Indeed, the case of *Cook v. Banker* | would reject this claim to priority, if it was founded simply upon an agreement to give a mortgage. In *Tallman v. Farley*, ¶ the subsequent mortgagee had

* See, however, Hilliard on Mort., 599, 600, and notes.

† See 2 Story Eq. Jur. (11th ed.), §§ 1237, 1228, and notes.

‡ See *Meech v. Allen*, 17 N. Y., 300; *Cook v. Kraft*, 60 Barb., 409; *Cook v. Banker*, 50 N. Y., 655.

§ 4 Edw. Ch., 673.

| 50 N. Y., 655.

¶ 1 Barb., 280.

advanced money on the credit of the land ; and, upon obtaining title, the mortgagor at *the same time* executed the mortgage. But EDMONDS, J., in delivering the opinion of the court, says: " If the judgment creditors could find a moment of time in which their debtors had a right to sell or incumber the premises in preference to the claim of the second mortgagees, they might perhaps find some aliment on which their legal claim might be fed." *Haywood v. Nooney*,* was a case within the decision of *Jackson v. Austin*,† and does not profess to decide anything more. Other cases are cited by the respondent, but I am of opinion that they do not decide the question in favor of the plaintiff. No case has been cited in this State, which recognizes an *equitable lien* in favor of a stranger who advances a portion of the purchase-price. It is not pretended that he can proceed in equity to establish a lien, as the vendor may, for unpaid purchase-money. His claim must therefore rest entirely upon the agreement for a lien. The statute comes to his aid if he has taken a *simultaneous* mortgage for money advanced to pay for the land.‡ If he neglects to take such security until the lien of a former judgment attaches to the land, he is remediless, unless he is able to make a case for a court of equity to relieve him by declaring that to be done which ought to have been done at the time. I see nothing in this case to call upon a court of equity to give effect to the subsequent mortgage, as though it had been executed when it was agreed to be executed. If the deposit of the deed had been made at the very time of obtaining it, that might have operated to create a simultaneous lien. Can it be regarded as having been made at the same time, although deferred till the next day? I well see that there may have been some reasonable excuse for it; but none is proffered in this case; and no fraud or accident is alleged, which calls upon the court to interfere and declare that what was done afterward should be treated as though it had been at the time agreed upon.

In my opinion it is a case of simple neglect or carelessness; and courts do not relieve parties who lie by and allow other creditors to gain a legal advantage. But it has been held that a *parol* agreement to deposit or mortgage will not be enforced; § nor will equity

* 8 Barb., 648.

† 15 Johns., 477.

‡ *Jackson v. Austin*, *supra*.

§ 4 Kent, 151, and cases cited; 2 Story Eq., § 1020; 1 Hilliard on Mort., 600.

consider that as done which ought to be done, unless the court has authority to order that the act be done.*

Now, I am opposed to extending our jurisdiction to doubtful cases, and reaching out to see if we cannot find some plausible excuse for creating an equity which will deprive a creditor of his legal advantage. The judgment is clearly erroneous in relation to the \$600 included in the plaintiff's mortgage; and, in my opinion, there are no grounds of equity stated in the pleadings or proved on the trial, which will uphold the judgment as to any part of the plaintiff's mortgage.

The defendant Adams has, by the neglect of the plaintiff, obtained a prior lien on the lands; and I have found no well considered authority which calls upon this court to deprive him of it in favor of a subsequent mortgagee.

On both grounds I think the judgment should be reversed and a new trial granted, costs to abide the event.

MULLIN, P. J., and SMITH, J., concur in the opinion as to the old debt secured by the mortgage, but are of opinion that the judgment is right in preferring the loan of \$500. The judgment must, therefore, be modified accordingly, and as modified affirmed, without costs of appeal to either party.

Judgment modified, and as modified, affirmed, without costs of appeal to either party.

CHRISTINA GUNDLACH, RESPONDENT, v. THE GERMANIA
MECHANICS' ASSOCIATION, APPELLANT.

Corporation — Benevolent society — powers of — amendment to articles of association — when not retroactive.

A corporation whose general purpose is declared to be the welfare of its members, and particularly their relief in times of sickness and distress, may extend its benefits to the families of its members, and make provision for the widows of deceased members.

The defendant's articles of association provided that upon the death of one of its

* 1 Hilliard, 600, note (a), citing Clabaugh v. Byerly, 7 Gill, 354.

members, his widow should be entitled to receive four dollars monthly during widowhood. After the death of plaintiff's husband the article was amended so as to entitle the widows to receive one dollar from each member of the society. *Held*, that the new article was not retroactive, and that plaintiff was entitled to receive the monthly allowance provided for by the original article.

APPEAL from a judgment in favor of the plaintiff, rendered upon the decision of Mr. Justice HARDIN, in Onondaga county, at the January Circuit, 1874, the cause having been tried before him without a jury. The facts are contained in a stipulation, and may be briefly stated as follows:

The defendant is a corporation formed January 10, 1860, under which the subscribers associated themselves together, "for the general purposes of improvement and welfare" of themselves "and others," by signing their names to the constitution and by-laws of the association, "and for the particular object of mutual relief of the members of the association, in times of sickness and distress."

The plaintiff's husband and the husbands of her assignors, each signed the constitution and by-laws, and became members of the society. One of the articles of the association contained this provision, viz.:

"Upon the death of one who has been a member of the association for six months last prior to his death, his widow shall be entitled to receive the sum of four dollars monthly during widowhood."

The plaintiff's husband and the husbands of her assignors, died after a membership of six months, immediately prior to their decease. Subsequently to their decease the article above set forth was revised, under authority of a provision which reads as follows, viz.: "A revision or alteration of the articles of the association can be made at a general meeting of the members thereof, by a majority of the votes of the members present."

The revised article, adopted in conformity with the provision, reads as follows, viz.: "Upon the death of a member, each person who may be a member of the society shall pay to the widow of the deceased member the sum of one dollar."

The arrears due to the plaintiff under the original article were

allowed by the decision of the court, against the defendant's objection and exception.

W. C. Ruger, for the appellant.

I. C. Hunt, for the respondent.

MORGAN, J. :

No question is made as to the right of the plaintiff to maintain a suit to recover her allowance under the original article, unless that right is taken away by the subsequent revision. A point is, however, made that the provision for the benefit of the widows of deceased members is *ultra vires*, and not within the scope of the powers of the society, under the articles of association. The objects of the society are not very artistically defined.

The general purposes were declared to be the welfare of the associates and others, and particularly the mutual relief of the members in times of sickness and distress. I am of opinion that the society could extend its benefits to the families of its members, and that such provision in favor of the widows of deceased members, was not only highly meritorious, but fairly within the scope of the general purposes of the organization. Indeed, the revised article is just as objectionable as an excess of power as the original article itself. The constitution and by-laws should have a liberal interpretation for the purpose of promoting the general objects of the society, and, as such a provision for the benefit of the families of the members is in no way hostile or opposed to the general plan of the organization, I am of opinion it should be upheld as a proper exercise of the powers conferred upon the association.

The main question is, whether the allowance to the plaintiff was cut off by the adoption of a new article after the death of her husband. It does not, in terms, attempt to do so by any language which points to such a result. It is not in form *retroactive*; and, upon familiar rules of interpretation, ought not to be so construed as to cut off rights already fixed.*

It must be conceded, I think, that the provision in favor of the

**Dash v. Van Kleeck*, 7 Johns., 477; *Quackenbush v. Danks*, 1 Den., 128; *S. C.*, 3 id., 594; *Johnson v. Burrell*, 2 Hill, 289; *Wood v. Oakley*, 11 Paige, 408.

plaintiff was in all respects binding, as a contract between the association and her husband. The association undertook to pay to his widow a monthly allowance after his death, if at the time of his death he was a member, and had been such member for the preceding six months. After his death it is not perceived how the association can, by adopting a new article or by repealing the old one, relieve itself from this obligation.

But, independent of this consideration, it is safe to say that the new article does not, in form or substance, attempt to repudiate its obligations where they had already become fixed by the death of one of its members.

The judgment should be affirmed.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment affirmed.

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JOSEPH FIELD, RESPONDENT, v. SYLVESTER E. PARKER,
APPELLANT.

Justice of the Peace — execution issued by — need not show on its face jurisdiction by the court of the subject-matter of the action — Ministerial officer — when protected by process.

An execution issued by a justice of the peace who has general jurisdiction to issue executions in his court, need not state facts necessary to give the justice jurisdiction of the action, in which the judgment upon which it is issued is entered.

If the process be such as the court or officer issuing it has general jurisdiction to issue in proper cases, the officer executing it is protected by it. The defect must appear upon the face of the process, to render the officer executing it liable.

APPEAL from an order of the Special Term in Genesee county, granting a new trial.

The plaintiff brought his action to recover the possession of a horse, levied upon by the defendant (a constable) under an execution purporting to be issued upon a judgment rendered in a Justice's Court. The principal question litigated on the trial was, whether the property levied upon was exempt property. The

FOURTH DEPARTMENT, APRIL TERM, 1875.

jury found for the defendant. The justice at Special Term granted a new trial upon the sole ground that the execution was no protection to the officer for making the levy, as it did not appear on its face that the justice had jurisdiction of the subject-matter upon which he rendered judgment. The judgment before the justice was recited in the execution, but not proved on the trial. The execution was in the following form :

"THE PEOPLE OF NEW YORK.

"GENESEE COUNTY, }
 "Town of Bergen. }

"To any Constable of said County :

"Whereas, judgment has been rendered before me, the undersigned, against Joseph Field and Morris Gifford, defendants, in favor of Mrs. Mary E. Gleason, plaintiff, for \$103.55: These are, therefore, to command you forthwith to levy of the goods and chattels of the said defendant (except such as are exempt by law), the amount of the said judgment, with interest thereon from the 4th day of October, 1873, on which day judgment was rendered, till received, and bring the money before me at my office, in sixty days from the date hereof, to render to the said plaintiff for her debt and costs.

"Dated at the said town this 4th day of October, 1873.

"Debt	\$100 00
"Costs	3 55

"Judgment.....	\$103 55
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"THOMAS D. DEAN,

"Justice of the Peace."

Lent & Crosby, for the appellant.

J. M. Dunning, for the respondent.

MORGAN, J.:

The form of execution complies with the direction of the statute,* and has been in use for over thirty years. It is in the form

*2 R. S., 249, § 131.

prescribed in the text books and printed for use of justices ever since the enactment of the Revised Statutes.* The justice who issued it has general authority to issue executions upon judgments in his court, and nothing in it indicates a want of jurisdiction in the justice to render such a judgment. Indeed, at the bottom we have the information that the judgment is for *debt*, \$100; costs, \$3.55; judgment, \$103.55. It is, however, held by the judge at Special Term, that it should also appear that the cause of action is one over which the justice had jurisdiction. Since the forms of action have been abolished by the Code, it would be somewhat difficult for the justice to comply with such a rule. All actions now are actions on the case, and many of them do not come within the jurisdiction of the justice. Must he state that the case before him was upon a note, or upon some other obligation coming within his jurisdiction? In my opinion, it is sufficient in this case that the execution is regular and legal in form, and issued by a justice who has general authority to issue executions upon judgments in his court. Ever since the case of *Savacool v. Boughton*,† the courts have been inclined to disregard many of the niceties formerly insisted upon in relation to the sufficiency of process to protect ministerial officers; and the principle of that case would certainly support the execution in this case as sufficient to protect the officer. If the process be such as the court or officer has general jurisdiction to issue in proper cases, the officer is protected. He need not look behind his process to know that there is authority to issue it.‡

The officer is protected, although the court or officer had no jurisdiction in fact, if the defect does not appear on the face of the process.§ In Cowen and Hill's notes to Phillip's Evidence,|| the question is fully discussed and the conclusion reached, that to expose the officer, the want of jurisdiction over the subject-matter must not only exist, but appear upon the process. As to the rule laid down by MARBY, J., in *Savacool v. Boughton*,¶ the author says it is expressed too cautiously, whereas his principle would

* 2 Wait's L. and P., 714; Cowen's Treat. (4th ed.), § 1568; Benedict's Treat., 430.

† 5 Wend., 170.

§ PAIGE, J., in *Fullon v. Hunter*, 1 Barb., 555.

¶ 5 Wend., 170.

‡ 2 Wait's L. and P., 49.

|| 1007 to 1009, part 2.

have fully warranted him in saying, within *Gwinne v. Pool*, that to expose the officer, the want of jurisdiction over the subject-matter must not only exist, but must appear on the process, unless he had clear knowledge of the facts some other way. The case of *Gwinne v. Pool* was a remarkable case, and fully considered. It may be found in black letter, reported in 1704 by Lutwyche,* and afterward translated by Nelson.†

I will cite a single paragraph of the opinion by Baron POWELL: " 'Tis true, when actions are brought in inferior courts, the plaintiff must always entitle such court to jurisdiction by showing that the cause did arise *infra jurisdictionem*; but when a justification is made of a supposed trespass under any warrant or judgment given in such court, all the proceedings there shall be intended regular until the contrary is shewed; and therefore, when the defendant justified by a warrant out of the Court of Admiralty, and did not aver that it was for a maritime cause, the justification is good; and it was my Lord HALE's opinion that it is sufficient to show the warrant which the officer is bound to obey, and is not obliged to show that the cause of action did arise *infra jurisdictionem*."

And the rule is thus stated by SAVAGE, J., in *Rogers v. Mul-liner*.‡ He says: "Ministerial officers are not responsible for executing any process, regular on its face, so long as the court from which it issues has general jurisdiction to award such process."

Now, justice's courts have general jurisdiction to issue executions to enforce the collection of judgments rendered by them. The execution in this case is regular on its face, and no objection is made, except the single one that it does not affirmatively show that the action in which the judgment was rendered was in fact within the jurisdiction of the justice. It does appear that the judgment is for a debt of \$100, if we have liberty to refer to the written memorandum at the bottom of the execution. So far, it appears affirmatively that the justice did not render a judgment in an action for slander or malicious prosecution, or other prohibited cause of action, nor go beyond his jurisdiction as to the amount.

On the whole, I am of opinion that this form of execution is sufficient to protect the constable. It is regular on its face, and one which a justice of the peace has general authority to issue to enforce

* 2 Lutw., 988, 1560.

† See Nelson's Translation, 290.

‡ 6 Wend., 602.

judgment in his court. We ought not to encourage a technical objection of this nature, unless compelled to do so by undoubted authority. It would show us less liberal in the protection of ministerial officers than the judges were 150 years ago. There is no occasion, no necessity, and no reason why we should disturb the universal practice in this State in regard to the forms of executions in justice's courts.

I do not feel compelled, by the authorities cited, to uphold the objection. None are cited directly on the point, and unless some direct authority is found which we are bound to respect, I think we ought to overrule the objection.

It is admitted that there is a strange confusion of authorities on the general subject, and they are collected and commented on by Cowen and Hill, in their notes to Phillips' Evidence, at the pages already cited; but the conclusion finally reached by them is reasonable and just, and is, I think, correctly stated in 2 Wait's Law and Practice, 49.

The order of the Special Term should be reversed and a new trial denied.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Order reversed and new trial denied.

JOHN BORST, RESPONDENT, v. THE LAKE SHORE AND
MICHIGAN SOUTHERN RAILWAY COMPANY, APPEL-
LANT.

Railroad crossing — Flagman — duty of railroad to passenger signaled to cross — escape of steam — nonsuit for contributory negligence — standing engine on track crossing public highway.

When a flagman who is stationed at a railroad crossing beckons a person waiting for an opportunity to pass, to cross the track, the person has a right to suppose that no change will take place in anything under the control of the railroad company which will increase the danger, and the sudden increase in the escape of steam from a locomotive, such as to frighten his horse, makes the railroad company liable for the injuries resulting from it.

Except in very clear cases the plaintiff, in an action brought to recover damages

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for negligence, should not be nonsuited on the ground that his own negligence has contributed to bring about the injury.

Semble, that stopping an engine on a railroad track where it crosses a public highway, in such a manner as partially to block up the highway, is an act of negligence.

APPEAL from a judgment of \$631.80, damages and costs, recovered against the defendant at the Erie county Circuit.

The action is brought to recover damages alleged by the plaintiff to have been sustained by him by reason of the defendant's leaving one of its engines standing in Elk street, in Buffalo, and thereby frightening plaintiff's horse while passing along upon said street, and causing him to shy over to the side of the street, and finally to run against a wagon which was then coming from an opposite direction, whereby plaintiff was thrown out and injured. It was also alleged by plaintiff that defendant's flagman was negligent in giving signals for said teams to pass.

The accident occurred at the crossing of Elk street and defendant's railroad in the city of Buffalo. Defendant's engine was engaged in moving a train of cars across the street, and came to a standstill near the side of, or a few feet more or less inside of, the north boundary of the street. The plaintiff, coming from the east, drove his horse up near to the east railroad track, and there stopped. The flagman signaled the plaintiff to come on.

The plaintiff claimed that the steam from defendant's engine blew out more while plaintiff was crossing the track than it did when he was signaled to do so, and that this caused his horse to shy and produce the injury complained of.

At the close of plaintiff's evidence, and again after the close of all the proofs, the defendant's counsel moved for a nonsuit on the ground of plaintiff's contributory negligence, which was denied.

The court charged the jury that some of the testimony, as it understood it, tended to show "that the violence with which this steam was blown out from the locomotive, at the time plaintiff crossed in front of the engine, was increased, and the horse was frightened in consequence of that; if that was so, that was negligence on the part of the company for which they would be liable." Whereupon the counsel for the defendant requested the court to further charge, that unless such increase of noise was caused by the

negligence of the defendant or of its servants, the defendant was not liable therefor in this action, which request was denied and an exception taken.

The court further charged the jury: "I think that when the flagman, who is stationed there for this purpose, beckons the passenger who is waiting in the highway for an opportunity to cross the track, the traveler has a right to suppose that no change will take place in anything under the control of the railroad company, that is likely to increase the danger. That seems to be the common sense of it, and I have no doubt it is the law. They have a right to rely upon the action of the flagman who is indicating to them; that is, that there are no trains coming in either direction, and in sight, and nothing which is in the control of the company shall be changed, as to quantity of steam that is being emitted, or noise made."

The jury rendered a verdict for \$500 in favor of the plaintiff.

A. P. Laming, for the appellant.

Thomas C. Holmes, for the respondent.

E. DARWIN SMITH, J.:

The motion for a nonsuit, on the ground that the plaintiff was guilty of negligence contributing to the injury, I think, was properly denied. The question of negligence in all this class of actions is a complex one, involving a species of double issue, primarily one in respect to the negligence of the defendant, and then a counter inquiry, whether the plaintiff was free from negligence contributing to the injury. Some times the evidence may be so clear and undisputed upon one branch of the issue, and so entirely fail to make out a cause of action, that the court may properly nonsuit the plaintiff; but, as the whole question is one of fact, and one upon which different minds may come to opposite conclusions, even among judges, I think the better opinion is well expressed by Lord DENMAN, in the late case in the House of Lords of *Bridges v. The North London Railway Company* (30 L. T. [N. S.], 844; 10 Alb. L. J., 464), that nonsuiting the plaintiff in this class of cases is generally a departure from the old maxim of the English law, "*ad quæstiones facti non respondent iudices.*"

The conduct of the plaintiff in all this class of cases is generally so mixed with, and dependent upon, the conduct and acts of the defendant and the surrounding circumstances of the case, that this question, in most cases, fairly belongs to the jury, in the general consideration of the whole facts of the case.

At the close of the charge, the counsel for defendant requested the judge to charge, "that if the jury should find that there was any additional noise coming from the engine after the plaintiff started to cross the track, that unless that increase of noise was caused by the negligence of the defendant or its servants, the defendant was not liable therefor in this action, although such noise frightened plaintiff's horse, and contributed to this injury." The Circuit judge did not, in form, charge as requested, but said, in explanation, "that he thought, when the flagman, who is stationed there for this purpose, beckons the passenger who is waiting in the highway for an opportunity to cross the track, the traveler has a right to suppose that no change will take place in anything under the control of the railroad company likely to increase the danger. That seemed to him the common sense of it, and he had no doubt it was the law. They have a right to rely upon the action of the flagman who is indicating to them that there are no trains coming in either direction, and in sight, and nothing which is in the control of the company shall be changed as to quantity of steam that is being emitted, or noise made." The counsel excepted to this charge, and also to the refusal of the judge to charge as requested. This explanation of the charge seems to me substantially correct. The judge asserts, in substance, that this plaintiff, when beckoned two or three times by the flagman to cross the track, had a right to assume that it was safe to do so, so far as the acts of the defendant and its agents were concerned; and if more steam was emitted from the engine while he was passing than before, that was an unfair surprise to the plaintiff, and if it contributed to the injury, it was the fault of the defendant's agents, for which the defendant was responsible.

The judge was not called upon, I think, in response to the request, to charge that if there was any additional noise coming from the engine after the plaintiff started to cross the track, unless that increase of noise was caused by the negligence of the defend-

ant or its servants, the defendant was not liable in this action. The very position of this engine in the public highway, and the occupation and blocking up of said highway by it, was of itself an act of negligence; and all its concomitants are parts of such negligence, and a continuation and aggravation of the original wrong to the public and to the plaintiff.

It appeared in evidence that, at the time of the accident, the defendant occupied a considerable portion of the roadway of Elk street, where the accident occurred, with one of its engines facing the street and fired up, and letting off steam, more or less, at the time the plaintiff attempted to cross the track, and for some twenty minutes previously, as the plaintiff states the time, while he was obstructed and hindered from passing, and waiting to pass over the railroad track, through a space thus narrowed from its proper width of forty-two feet between the sidewalks by the engine on one side, and by the cars on the other, to the space of about eighteen or twenty feet. This is the statement of the plaintiff and his wife. It is true there is some conflict in the evidence in respect to the extent of the obstruction in said street caused by said engine and the defendant's cars on the opposite side of the street; but I think it cannot be doubted, upon the evidence, that the said engine, attached to cars behind it, occupied on one side the whole width of the sidewalk, and the engine projected some feet south of the sidewalk, which was ten feet in width, into the traveled part of the highway, or the jury were authorized so to believe and find.

The point of the request to charge, was directed to a portion of the charge in which the Circuit judge had said that there was some evidence given on the part of the plaintiff, which, as he understood it, "tended to show that the violence with which this steam was blown out from the locomotive at the time he crossed in front of the engine, was increased, and that the horse was frightened in consequence of that—if that was so, that was negligence on the part of the company," etc. The judge had thus stated that such increase of steam which caused the noise, etc., was negligence, and it was hardly his duty to repeat that remark. The view of the counsel making the request was, doubtless, to ask the judge to discriminate between the negligence of the defendant and that of

its agents and servants, and to cast the blame of such increase of steam and noise upon the engineer in charge of the locomotive, as a matter of personal wrong on his part, for which he alone, and not the company, was responsible. There was not any ground for such discrimination, no evidence calculated to relieve the defendant from the consequences resulting from the location of the locomotive and the injury caused by the emission of the steam therefrom, whether increased or not at the time the plaintiff was passing the same. No error was committed, I think, by the judge, in not acceding to the request so made to charge otherwise than as above stated, or in his ruling in other respects, and the judgment should be affirmed.

Present—MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment affirmed.

WILLIAM W. WRIGHT, APPELLANT, v. SYLVESTER P.
PIERCE AND OTHERS, RESPONDENTS.

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Vendor and vendee—sale in expectation of immediate payment—conditional—how condition waived—Inconsistent remedies—election of one—effect of.

Where a vendor delivers property in the expectation of immediate payment therefor, the delivery is conditional; but such condition may be waived, and will be deemed to be so after a considerable period of time has passed without any steps being taken by him to assert his right to repossess the goods.

An election of one of two inconsistent remedies, whenever made, is conclusive against the right of the party to adopt the other.

APPEAL from a judgment, entered on the report of a referee. The action was for the wrongful taking and conversion of personal property.

The defense was, that the sheriff of Onondaga county seized and took from the possession of one Abijah J. Wright said property, by virtue of an attachment issued in an action in the Supreme Court in favor of defendants against said Abijah J. Wright, and that subsequent to the seizure, the defendants recovered judgment

against said Abijah J. Wright, and issued execution to said sheriff, who, by virtue thereof, sold said property; and that said property was not the property of the plaintiff, but was defendants' property.

On the 30th day of November, 1871, the defendants in this action sold and delivered to Abijah J. Wright goods to the amount of \$209.21, he to pay \$100 on delivery, and the balance in monthly installments of twenty-five dollars each. The vendee being in possession on the 4th of December, 1871, mortgaged the goods to the plaintiff for value.

Noxon & Cowles, for the appellant.

E. Butler, for the respondents.

E. DARWIN SMITH, J.:

Assuming that the referee was correct in finding that the property for which this action was brought was originally sold by the defendants to Abijah W. Wright upon the agreement that he should pay upon delivery \$100 toward the purchase-money, and the balance in twenty-five dollars monthly payments thereafter, and that the title to said property should not pass to the said vendee, but should remain in the defendants until the whole purchase-price was paid, the referee I think erred in holding that the title remained in the defendants at the time of the commencement of this action. The property having been delivered to the vendee, the defendants' rights in respect to it were like those of a vendor who sells property without any terms of credit, and delivers the same upon the expectation of immediate payment. The delivery in such case would be conditional, and the condition might be waived, and would be deemed waived after a considerable lapse of time without any steps taken to assert his rights to repossess the goods. (*Hennequin v. Sands*, 25 Wend., 640.) In this case the delivery was made on the 30th November, 1871, when the vendee paid \$100 toward the purchase. The vendee, being in possession of the goods, mortgaged the same to the plaintiff, on the fourth of December afterward, who took said mortgage for value and in good faith. The vendee failed to make any further payments, and the defend-

ants, it appears, took no steps to assert their right to reclaim said property before the 2d day of October, 1872, when they commenced an action against the said vendee for the price of said goods. The complaint in the said action, in the ordinary form, set forth that the said defendants, during the years 1870 and 1871, had sold and delivered goods, wares and merchandise to the said Abijah J. Wright, and that a certain balance thereon then remained due and unpaid to them for such goods; and the said complaint was duly verified by one of the plaintiffs in said action. This complaint was followed by an attachment in the said action, issued on the fourteenth October, on which the said goods were seized, and judgment on the twenty-ninth of the same month, on which execution was immediately issued, under which the said goods were levied on by the sheriff. The commencement of that action was a clear waiver of the right of the defendants to reclaim said goods—treating the delivery as conditional, and the title thereto as still remaining in them—and was an election or evidence of an election previously made to treat said sale as absolute. An election of one of two inconsistent remedies, whenever made, is final and conclusive upon the party. (*Morris v. Rexford*, 18 N. Y., 552; *Rodermund v. Clark*, 46 id., 356; *Bank of Beloit v. Beale*, 34 id., 473.)

The effect, of such election, in respect to the plaintiff, was the same as if the right to make it and reclaim the said goods, had never existed. It operated, by relation, to give validity and effect to the plaintiff's mortgage as of its date.

The judgment must therefore be reversed and a new trial granted, with costs to abide the event.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment reversed and new trial granted, costs to abide event.

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WILLIAM H. GRIMES, PLAINTIFF, v. JOSEPH HILLEN-
BRAND, IMPLEADED, ETC., DEFENDANT.

Negotiable paper — illegality in consideration — when void in hands of a bona fide holder.

Negotiable paper in the hands of an innocent holder, who has received it in good faith and in the ordinary course of business, for value and without notice of any defense to it, is not rendered invalid by reason of any illegality in its consideration, unless it is expressly declared void by statute.

MOTION for a new trial upon exceptions taken at the Circuit, and ordered to be heard in the first instance at the General Term.

The action was upon a promissory note of \$500 against maker and indorser.

The defense was, that the note was executed to prevent opposition by a creditor of the maker, to the discharge of the said maker in bankruptcy, and in fraud of the bankrupt law; and also that it was given in pursuance of the terms of a composition deed executed by the creditor of the maker, the creditor to whom it was given receiving a greater percentage of his debt than the other creditors. Plaintiff was a *bona fide* holder of the note, having received it before its maturity for a full consideration.

Humphrey & Lockwood, for the plaintiff.

Daniel Pratt and *Rowan & Helm*, for the defendant. The note in suit is void under the insolvent laws, and also void under the general provisions of law, it being given to induce the creditor to sign a compromise, and thereby gain a preference over other creditors, and perpetrate a fraud on the other creditors. (*Payne v. Eden*, 3 Caines' Cases, 213.) It is a well settled rule of law that any separate advantage attempted in composition with creditors is void. (*Townsend v. Newell*, 22 How. Pr., 164; *Higgins v. Mayer*, 10 id., 364.) Every secret advantage to one creditor, and every security not provided for in the deed, are void. (12 Johns., 309; 1 P. Wms., 768; 4 East, 372; 3 Caines, 213.) It is not only a fraud upon the other creditors, but is against public policy. (4 Johns., 410; 12 id., 306; 19 id., 311; 2 id.,

386; 3 Caines' Cases, 213.) A note is of no greater validity than a naked promise. (*Bliss v. Matteson*, 45 N. Y., 22-25; *Carroll v. Shields*, 4 E. D. Smith, 466; 36 N. Y., 129; *Beach v. Ollendorf*, 1 Hilt., 41; *Higgins v. Mayer*, 10 How., 363.)

E. DARWIN SMITH, J.:

The verdict of the jury settles the question of fact, that the plaintiff was a *bona fide* holder of the note in suit, and that he received it before maturity, and without notice of any of the circumstances which would have made it invalid in the hands of the original owner; and also that said note was not given to induce Schen, the original holder, to refrain from opposing the discharge of the maker in bankruptcy. The jury were properly instructed, that if the note was given and received for that purpose, it was void, and their verdict should be for the defendant. If the note was given, as the jury must have found under the charge and the evidence of the witness Schen, to induce said witness to sign the compromise deed, or agreement, produced in evidence and set out in the case, although it was fraudulent and void as between the original parties, it still was valid in the hands of a *bona fide* holder.

The judge stated the rule correctly, that negotiable paper, in the hands of an innocent holder who had received it in good faith, and in the ordinary course of business, for value, and without notice of any defense to it, is not invalid by reason of any illegality in the consideration, unless it is expressly declared void by statute. (*Chitty on Bills*, 92; *Hill v. Northrup*, 4 N. Y. S. C., 120; *Edw. on Bills*, 336, 337; *Story on Prom. Notes*, § 192.) It is doubtless true as the defendant's counsel insists, that all transactions forbidden by statute are void, as are also all agreements for suppressing evidence or compounding criminal prosecutions, felonies or misdemeanors, or against sound morals, public policy or interest, as between the original parties. The case of *Conderman v. Hicks* (3 Lans., 110), illustrates the rule. The action in that case was upon a promise to pay money, not negotiable, given to compound a criminal offense. The defense to it was good and available, the same as it would have been between the original parties.

These views meet, I think, all the substantial points presented upon the defendant's exceptions.

The case was very fairly submitted to the jury upon a charge quite elaborate and clear, and essentially sound. None of the exceptions taken to it, or to the refusals of the judge to charge, or modify the charge, I think, are well taken.

The motion for a new trial should be denied, and judgment ordered for the plaintiff upon the verdict.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Ordered accordingly.

HUNTINGTON BEARD, RESPONDENT, v. JAMES ROOT,
APPELLANT.

Promissory note — what amounts to an extension of time of payment of — Indorser — discharge of.

In this action brought against the defendant as indorser of a promissory note, the defense was interposed that the plaintiff, after the maturity of the note, had, by an agreement with the maker, extended the time of payment without defendant's consent. By the agreement, the maker of the note assigned to the plaintiff a bond and mortgage for \$600, having six months to run, upon which the plaintiff advanced \$100; the agreement providing that from the proceeds of the mortgage he was to retain the \$100 with interest, the amount of the note, and enough to make up the sum of \$525; that if, before the maturity of the mortgage, the maker of the note should repay the \$100 with interest, together with the amount of the note, then thirty dollars should be deducted from the amount to be retained from the proceeds of the mortgage. *Held*, that the agreement operated to extend the time of payment of the note until the maturity of the mortgage, and that the defendant was discharged thereby.

APPEAL from an order made at Special Term, directing judgment for the plaintiff upon a verdict, and denying a motion for a new trial. The action was brought against the defendant as indorser of a promissory note for \$226.25.

The defendant claimed that he was discharged from all liability upon the note by an agreement entered into between the maker thereof and the plaintiff, after its maturity, by which the time of payment was extended. The evidence of the agreement was the following receipt given upon the assignment of a mortgage by the maker to the plaintiff:

"I have this day received the assignment of a bond and mortgage, executed by Elijah Eason to Wm. Brown, dated July 25, 1871, for the sum of (\$600) six hundred dollars and interest, payable six months from date, upon which I have this day advanced him (\$100) one hundred dollars, and I also hold his promissory note for an amount I am not now able to determine, but it is between two and three hundred dollars. Now, if the said Brown shall pay me the amount of the said note and cash advanced, with interest thereon, before said mortgage becomes due, I am to discount to him the sum of thirty dollars from the amount he is to deduct on the mortgage, and if he does not pay the same before due, then the assignment to be absolute for the sum of \$525. The balance due on said mortgage to be paid to said Brown when the mortgage is due and collected.

"August 11, 1871.

"HUNTINGTON BEARD."

Geo. F. Kennedy, for the appellant.

L. C. Gardner, for the respondent.

E. DARWIN SMITH, J. :

The offer of the defendant's counsel to show that the arrangement made by the plaintiff with Brown, the maker of the said promissory note, was made without the knowledge or consent of the defendant, I think was improperly overruled. The arrangement referred to, embraced in the assignment of the \$600 bond and mortgage and the receipt therefor, was a contract, as held by the judge, and involved upon the face of the transaction an extension of time for the payment of said note during the period the said bond and mortgage had to run before maturity. The note was then past due, and an extension of the time for the payment thereof without the consent of the indorser, would discharge such indorser. It was, therefore, the right of the defendant to make this proof, if he was able to do so. It is doubtless true that the mere taking of collateral security for a debt, without an agreement to extend the time of payment, does not discharge a surety. (*Bank of Utica v. Ives*, 17 Wend., 502; *Van Etten v. Troudden*, 3 N. Y. S. C., 604; *Cary v. White*, 52 id., 144.) But it is not necessary

that the agreement to extend the time of payment be in express terms.

The contract in this case unavoidably, and by clear implication, includes such an agreement. The debtor sells and assigns to his creditor a bond and mortgage for \$600, having six months to run, for the consideration of \$525, and interest on the mortgage which was paid and to be paid, as follows: \$100 in cash was paid in hand, and the note, amounting to the sum of \$241.78, making \$341.78. In addition to this sum, the defendant, on the payment of the bond and mortgage, was to retain from the proceeds thereof an amount sufficient to make up the sum of \$525, and pay the balance to the said debtor, with the condition therein contained, that if said Brown should pay the amount of said note and the cash advanced, before the said mortgage became due, the sum of thirty dollars was to be deducted from the amount the plaintiff was otherwise entitled to receive out of said mortgage. In other words, if Brown should pay the cash advanced and the amount of said note, he might redeem said mortgage by the payment of \$495, these sums included, instead of the said sum of \$525.

The arrangement provided for the payment of said note, absolutely, if not immediately, by the assignment of said bond and mortgage, out of the proceeds of said bond and mortgage, and implied a necessary extension of the time of payment thereof till the maturity of said bond and mortgage. The assignment of the bond and mortgage was absolute, with a condition in favor of Brown, allowing him to redeem the same. If he did not redeem, the plaintiff was entitled, by the contract, to retain the said sum of \$525 out of the proceeds of said bond and mortgage. This was not the mere taking of collateral security for the payment of the note. It was, on the contrary, an agreement providing for the payment of said note at the expiration of six months, and paying the plaintiff, for such extension of time, a bonus of \$183 besides interest; and, in any event, in case Brown redeemed the mortgage, a bonus of \$153.22. In this way the plaintiff was paid, or agreed to be paid, a very large bonus for the extension of the time for the payment of said note. He could not have sued this note during the period of six months, if he was entitled to retain it; and if the defendant had applied to him to pay the same, he could not have

transferred to him the said note, with a right to immediately enforce payment thereof.

This is precisely the case stated in the opinion of Judge ALLEN, in *Cary v. White* (*supra*), where he says: "If the legal implication is that by taking of collateral security, payable in future, the creditor agrees to forbear to sue upon the original indebtedness for a time, then, in all cases, sureties would be discharged."

It was error, I think, to deny the motion for a new trial. The order denying such motion should, therefore, be reversed, and a new trial granted, with costs to abide the event.

Present — MULLIN, P. J., and SMITH, J.

Order reversed and new trial granted, costs to abide event.

ANSON U. BECKER, RESPONDENT, v. GEORGE HOWARD
AND BRONSON C. RUMSEY, APPELLANTS.

Lis pendens — Tax sale — effect of, on prior mortgage — chap. 427, Laws of 1855.

A *lis pendens* only relates to and affects voluntary alienations of property pending a suit in respect to it, by or from the defendant therein, and in no way affects independent parties asserting adverse rights in respect to it.

Where land, upon which there is a recorded mortgage, is sold for unpaid taxes, and a deed thereof is subsequently given by the comptroller, the purchaser acquires the legal title to the land, subject only to the right of the mortgagee to redeem as provided by sections 76 and 77 of chapter 427 of 1855.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury. This was an action of ejectment brought to recover the possession of certain land in Cattaraugus county. The plaintiff claimed to be the owner of the premises by virtue of a conveyance from one Salmon, who had purchased the same upon the foreclosure of a mortgage. The defendants' title was founded upon a certificate of sale for non-payment of taxes and a deed from the comptroller given in 1869. It was proved that the notice to redeem required by sections 76, 77, 80 and 81 of chapter 427, Laws of 1855, had not been given.

The judge found, as a matter of fact, that the plaintiff was seized

in fee simple of the premises, and was entitled to the immediate possession of the same, and gave judgment accordingly, from which the defendant duly appealed to this court.

Sherman S. Rogers, for the appellants.

Geo. W. Cothran, for the respondent.

E. DAEWIN SMITH, J.:

In his findings of fact, the learned judge who tried this cause at the Circuit, besides the affirmative finding that the plaintiff was seized of the premises in fee simple, found also that the defendants had no title to the said lands and premises, nor any right to the possession of the same, or any part thereof. These findings, it seems to me, were erroneous.

The defendants introduced in evidence a certificate of the sale of the said premises, made by the comptroller of this State to the defendants, dated November 24, 1866, for the non-payment of taxes levied thereon, and also a deed from the comptroller in the usual form, made in pursuance of such sale, and dated February 16, 1869, conveying the same premises to the defendants, which deed was recorded in the clerk's office of the county of Cattaraugus, October 16, 1869. This deed was presumptive evidence that the sale and all the proceedings prior thereto, including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular, by the express terms of the statute. (Section 65, of the act relating to the collection of taxes on lands of non-residents, passed April 13, 1855; Session Laws of that year, page 793.) The necessary force and effect of this deed was to vest in the defendants the title to these premises by title paramount to the plaintiff's. Such title is not at all affected by the plaintiff's suit to foreclose the Baldwin mortgage, or by the *lis pendens* filed in said suit. A *lis pendens* filed under the statute only relates to and affects voluntary alienations of property, pending a suit in respect to it, by or from the defendant in the action. It is constructive notice to any such grantee or the persons dealing with the defendant in the action, and has nothing to do with independ-

ent parties asserting their own adverse rights in respect to the property. (*Harrington v. Slade*, 22 Barb., 166; *Sears v. Hyer*, 1 Paige, 483; *Stuyvesant v. Hall*, 2 Barb. Ch., 151; S. C., 1 Sandf. Ch., 419.) The doctrine of *lis pendens* applies only to persons who might be made parties. (*Parks v. Jackson*, 11 Wend., 442.)

Persons claiming in hostility to a mortgage, or by title prior or paramount, are not proper parties to a foreclosure of such mortgage, and cannot be affected by the decree, unless they come in and voluntarily submit to litigate their rights in such action (*Corning v. Smith*, 2 Selden, 82; *Lewis v. Smith*, 5 id., 514), and such parties cannot be affected by a *lis pendens* filed in such action. The defendants' rights arose at and relate to the time of their purchase at the tax sale, which was November 24, 1866, and before the commencement of the foreclosure suit and the filing of the *lis pendens*, which was filed August 17, 1868. The defendants had their certificates of sale in hand when the said suit was commenced, and had paid to the comptroller the purchase-money for said land, and had an initiate right to a deed thereof, provided the same was not redeemed, according to the statute, before the expiration of the two years from the date of their certificate, which period expired on November 24, 1868, subject only to the right of the plaintiff in the said foreclosure suit, or other assignee of said mortgage before the sale in such action, or of the plaintiff aforesaid, to redeem said premises within six months after service of notice requiring them so to do by the defendants, according to the provisions of sections 76 and 77 of said act of 1855. Section 63 of said statute provides, "that if no person shall redeem such lands within two years after the sale, the comptroller shall, at the expiration thereof, execute to the purchaser, his heirs or assigns, in the name of the people of this State, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject to all claims of the State for taxes thereon, or other liens or incumbrances."

Such is the defendants' deed and its effect. They acquired, by the comptroller's deed, the fee simple in the lands, subject to the lien of the plaintiff's mortgage, which, said section 76 declares, shall not be affected by such sale, except as provided in the next section (79), if the plaintiff or other party interested in said mort-

gage should fail to redeem in six months after notice so to do, in which case such lien is absolutely extinguished. The rights of the parties I conceive to be precisely the same, in legal effect, as they would have been if the State had had a mortgage for the tax on this land prior to the Baldwin mortgage, and had duly foreclosed such mortgage and sold the premises, upon the foreclosure sale, to the defendants, subject to the Baldwin mortgage, or omitting to make the mortgagee or the assignees of said mortgage parties to such foreclosure. In such case, the legal title to the premises would have passed to the defendants, subject to the right of the assignee or owner of the Baldwin mortgage to redeem from such sale. Such rights the plaintiff doubtless acquired by the purchase at the foreclosure sale. He has acquired and possesses the rights of a subsequent mortgagee, unforeclosed, where the title is vested in a purchaser under a prior foreclosed mortgage. He is simply a mortgagee, and as such cannot maintain an action of ejectment till he has extinguished the prior title of the defendants.

These views involve the reversal of the judgment and the granting of a new trial, with costs to abide the event.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment reversed and new trial granted, costs to abide event.

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4	303
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THE TRUSTEES FOR MANAGEMENT AND CARE OF
THE FUND FOR THE SUPPORT OF THE EPISCOPATE
OF THE DIOCESE OF CENTRAL NEW YORK, RESPOND-
ENTS, v. FRANCIS COLGROVE AND LOUISE COLGROVE,
INFANTS, BY GUARDIAN, IMPLEADED, ETC., APPELLANTS.

*Will — bequest — what is sufficient description of beneficiary — latent ambiguity. —
parol evidence to explain.*

The defendants' testator by his will authorized his executors "to pay over to the officers of the Protestant Episcopal Church, into the fund to support the episcopacy of said church," certain moneys therein specified. The plaintiffs were at that time, and still are, trustees for the management and care of a fund for

the support of the diocese of central New York, having been incorporated for that purpose under chapter 429 of 1868; at the time of making his will the testator knew of the existence of the said corporation, and of the fact that exertions were being made to increase the said fund. *Held*, that the plaintiffs were entitled to the bequest.

It appeared upon the trial that there were four other dioceses in the State of New York, besides the diocese of central New York, having, respectively, trustees and a fund held by them for the support of the episcopate, to either of which the terms of the bequest were applicable. *Held*, that this was a case of latent ambiguity, and that parol evidence and statements of the testator were admissible to show that he intended to bequeath the money to the plaintiffs.

APPEAL from a judgment in favor of the plaintiffs, entered upon the trial of this action by the court, without a jury.

This was an action in equity, brought to obtain an adjudication of a will made by John Carr, deceased, late of Trumansburgh, in Tompkins county, in this State, who died in January, 1872, leaving a last will and testament, of which the following is the sixth article or subdivision :

"Sixth. I give, devise and bequeath to my executors hereinafter named, my farm in Ulysses, upon which I now reside, in trust to sell the same at such time and for such price as shall seem to them meet, and give regular conveyance for the same, with or without a covenant of warranty, and from the proceeds and securities taken and received for the same, *the said executors are hereby authorized to pay over to the officers of the Protestant Episcopal Church, into the fund to support the episcopacy of said church, so much only of said proceeds of the said farm, and to include the said \$9,000 given to the Episcopal Church of the Epiphany in Trumansburgh, and the sum of \$500 hereinafter given to the Methodist Episcopal church of Jacksonville, as shall be and make one equal half of my whole estate, and no more.*"

The complaint also sought for an accounting of the executors of said will, and a judgment directing payment to the plaintiffs of the said legacy so given by said will to the officers of the Protestant Episcopal Church, for the support of the episcopacy of said church.

On the trial, the plaintiffs gave evidence showing that they were trustees for the management and care of a fund for the support of the episcopate of the diocese of central New York, comprising fourteen counties of said State, among others the said county of

Tompkins, and that they were duly organized as a corporation for that purpose, under an act of the legislature of this State, entitled, "An act to provide for the incorporation of trustees for the management and care of certain funds now held for the Protestant Episcopal Church, in the diocese of western New York," passed April 28, 1868; and they gave other evidence tending to show that the plaintiffs were entitled to receive and recover said legacy; and the judge so held and decided, and directed an accounting by said executors, to ascertain the amount which would be payable to the plaintiffs under said will.

From this order the defendants duly appealed to this court.

George N. Kennedy, for the appellants.

George F. Comstock, for the respondents.

E. DARWIN SMITH, J.:

The findings of the learned judge who tried this cause at Special Term, fully warrant his conclusions upon the law, and the order directed by him. The findings, among other things, state: "That, at the time of the making of said will, there was, and now is, appertaining to the diocese of central New York, a fund for the support of the bishop of said diocese and his successors in office, known as the fund for the support of the episcopate of said diocese, which said fund consists of about \$60,000 of invested capital, and is, and since its creation has been, in the custody and care of the incorporated body of trustees, who are plaintiffs in this action. The income of said fund is not sufficient to pay the salary of the bishop, and, at the time of the making of said will, an organized effort was being made in the diocese for the increase of said fund. The fact last mentioned was known to the said testator. That the said John Carr [the testator], in and by the sixth clause of his will, in fact intended to give the legacy therein mentioned to the plaintiffs in this action, for the augmentation and increase of the fund for the support of the episcopate." And as a conclusion of law he held and found that the said legacy was valid and belonged to the plaintiffs, and they were entitled to recover the same.

The first objection arising upon the defendants' exceptions to

the findings of the judge, is, that the plaintiffs are not officers of the Protestant Episcopal Church, but trustees of a fund existing for the purpose of supporting the bishop, and that the bequest is to be paid over "to the officers of the Protestant Episcopal Church." It is true that the bequest is not made to the plaintiffs by their corporate name, but this is not essential if the language of the will sufficiently describes them by their character, office or duty. All that is requisite in this connection, is such a specification or description of the object of the bequest or legacy, as will show the intention of the testator. (Wigram on Wills, 108; Hawkins on Wills, 9, 10; *Thomas v. Stevens*, 4 Johns. Ch., 607; *Connolly v. Pardon*, 1 Paige, 292; *Stephens v. Powys*, 1 De G. & J., 24.) Legacies to corporations frequently mistake the true corporate name, but this will not invalidate when the intent is clear. The identity of the party in a deed or will is always provable by parol. The bequest was not only given to the officers of the Protestant Episcopal Church, but, to make more sure in respect to the persons to take such bequest, the words are added, "*into the fund to support the episcopacy of said church.*" The plaintiffs are the trustees of such a fund, and they are included in the general description of the officers of the said church in connection with such fund. The intent obviously was to give it to the fund named in charge of the proper officers acting for the church or diocese in charge of such fund. The terms used are descriptive of the plaintiffs with as much accuracy as will probably occur in most cases in wills where legacies are given to charitable or benevolent societies, institutions or corporations. Wills, in many, and perhaps in most cases, are drawn in haste, and when there is not time or opportunity to learn the true name of the legatee, and courts are bound to give effect to the intention of the testator, if it can be ascertained, and see that his will is not defeated by narrow technicalities.

But it is objected further, "that the payment is to be made into the fund to support the episcopacy," and the testator may have intended that the fund be used and applied for the general purposes of the church, and not particularly for the support of the bishop of any particular diocese. If the language of the will were in form that said legacy should be used or paid to any persons or officers to support episcopacy in general terms, it would doubtless be liable to the

objection urged. Episcopacy, in such sense, would apply alike to all churches which have the episcopal form of church government. Webster defines episcopacy as a "government of a church by bishops or prelates; that form of ecclesiastical government in which diocesan bishops are established as distinct from and superior to priests or presbyters; government of the church by three distinct orders of ministers, bishops, priests and deacons." Such, doubtless, is the general sense or meaning of the word *episcopacy*, as commonly used and understood in this country and in Europe. This description of *episcopacy* would include, as the proofs clearly show, the Protestant Episcopal Church in this State and country, and these words necessarily limit and restrict the claim to this legacy to that church. And the language of the will does not make the bequest payable for the general support of the church on the ground that it is episcopal, and that in that sense it would support episcopacy. That clearly was not the intent of the testator. The bequest was to go into, that is to say, the proceeds of the said bequest were to be paid into, *the* fund for the support of *the* episcopacy of said church. This is precise and clear. The bequest is to be used and applied to increase or to be added to a fund already in existence, held by officers of the church for the support of the episcopacy of said church, that is, for the support of the order of bishops in said church. The word episcopacy in this bequest, is obviously used in the restricted sense, as synonymous with episcopate.

It is urged that there are in said diocese several other funds: a general fund, a missionary fund and a parochial fund, to which the words of the bequest might apply, as funds whose use was designed for the general objects of the church, and in this sense for the support of the episcopacy; but the terms of the bequest cannot apply to these funds, for they are neither created, designed nor held in trust for the support of the episcopacy of the church. The terms of the bequest, it seems to me, apply to the plaintiffs expressly, and that they are embraced within its design and particular description.

The next point presented by the defendants' counsel for consideration, arises upon the proof that there are four other dioceses in the State of New York, beside the diocese of central New York, having respectively trustees and a fund held by them for the support

of the episcopate, to either of which the terms of this bequest may be applied, and will apply as well, and equally so, as to the plaintiffs. This is doubtless so upon the face of the evidence, but this fact presents simply a case of latent ambiguity, in respect to which the rule is, that, inasmuch as the ambiguity is raised by extrinsic evidence, so it may be removed in the same manner. (Broome's Legal Maxims, 614; Bacon Legal Maxims, 90; Wigram on Wills, 107, 185, 232; Hawkins on Wills, 9, 10.)

The evidence received by the judge on the trial, directed to show the intention of the testator in making such bequest, and that such intention was to devote the proceeds of said bequest to the support of the episcopate of and in the diocese of central New York, I think, was all properly received. Extrinsic evidence is always admissible to show the situation of the testator, his family and his property, and of the existing and surrounding circumstances at or about the time of the making the will, and in aid of the construction of such will; and also declarations and acts of his, indicative of the purpose of his mind in respect to the will, or in respect to the legatees mentioned therein; and declarations not cotemporaneous with the will, may also be received as evidence of the intention of the testator. (*Doe v. Allen*, 12 Ad. & Ell., 451; 40 E. C. L.) It appears that the testator was a communicant in the Episcopal church at Trumansburgh, the place of his residence; that he knew the bishop of that diocese, and had heard him preach in such church upon one of his visitations to that parish, and had been introduced to him; and that he knew that an effort was making in the diocese to increase the fund for the support of the episcopate in said diocese, and that upon being visited by the rector of such parish, a day or two before his death, he put to him the questions following: "Are they not trying to raise a fund for the support of the bishop?" To which the minister replied: "Yes, sir; we are." And the said minister then further said to him: "If you are intending to leave a legacy toward church objects, I wish you would not forget our parish at Trumansburgh, for we are intending to build a new church there." To which the testator replied: "I intend to do something for that too." In his conversation with his attorney who drew the will, at the time when he gave instructions in regard to the will, he mentioned the name of Bishop Huntington, and said

he had seen him once at Trumansburgh; and he also said, speaking of the clause which was in his own language in regard to episcopacy: "That was to go into this fund; he said there were officers or men who had charge of a fund to support the episcopacy of that church." This evidence was admissible within the seventh proposition stated in the introduction to Wigram on Wills (O'Hara's 2d Am. Ed., p. 57) as follows: "Courts of law in certain cases admit extrinsic evidence of intention, to make certain the person or thing intended, when the description in the will is insufficient for the purpose." Also (at page 50), he says: "Evidence of intention is admissible to identify the subject or object of a gift."

The current opinion of the courts in this country is tending very clearly to greater liberality in receiving extrinsic evidence to aid in giving a construction and effect to wills, and show what property was intended to be devised, and what person was intended to take, as indicated by the following cases: *Howard, Executor, v. American Peace Society* (49 Maine, 288); *Winkley v. Kaime* (32 N. H., 268); *The Domestic and Foreign Missionary Society appeal* (30 Paine, 425); *Button v. American Tract Society* (23 Vermont, 336); *Du Bois v. Ray* (35 N. Y., 162); *Pond v. Bergh* (10 Paige, 152). Within the principle asserted in these and other cases, the extrinsic evidence taken at the trial was properly received in aid of the construction of this will, and was sufficient in connection with the will to warrant the finding of the learned judge, that the testator, as matter of fact, in and by the said sixth clause of his will, intended to give the legacy therein mentioned to the plaintiffs in this action for the augmentation of the fund for the support of the episcopate.

The order of the Special Term must therefore be affirmed, with costs.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

MORGAN, J., did not vote.

Order affirmed.

LEVI HOTCHKISS, RESPONDENT, v. NATHAN ENGLISH,
IMPLEADED WITH J. C. CUMMINGS AND OTHERS, APPELLANT.

Promissory note — authority to indorse — if not known to indorsee, and if parties do not hold themselves out as partners — liability where authority is exceeded.

Defendant English, being the owner of a patent right, entered into an agreement with the defendant Perine, by which Perine was, at his own cost and expense, to sell the said right; the proceeds of such sale to be divided, share and share alike. The agreement further provided that all notes should be taken payable to the order of English & Perine, and authorized Perine to sign the name, if necessary, of English & Perine in transacting the business or anything incident thereto, and for the purpose of converting such notes into cash or other securities. Perine, without any consideration, indorsed a note of a third person with the name of English & Perine, intending thereby to defraud English. The plaintiff purchased the note in good faith for full value and before maturity. English & Perine had never held themselves out as partners, nor did plaintiff know of the agreement entered into between them at the time of purchasing the note. *Held*, that the agreement did not authorize Perine to indorse the note in English's name, and that the latter was not liable thereon.

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was on a promissory note made by one J. C. Cummings, payable five months after date, for \$350, to the order of English & Perine, two of the defendants. The defendant English alone defended and appealed from the judgment. The referee found as matter of fact, that the said Cummings signed said note at the instance of one Belden, who paid him two dollars for signing the same, and that one of the defendants (Perine) indorsed said note in the name of English & Perine, and delivered the same to said Belden, without any consideration, and that said Belden delivered said note to one Spaulding, who transferred it to Mills, one of the defendants, who transferred it, before maturity, to the plaintiff, who paid for it full value and consideration, and became a *bona fide* holder thereof without notice of the circumstances under which it was made.

The defense was that Perine had no authority to indorse English's name upon the note, and that he did so in pursuance of a

conspiracy to cheat and defraud him. It was claimed that Perine had such authority by virtue of the following agreement :

“ An agreement made and entered into this 8th day of January, 1872, between Nathan English of the town of Greece, Monroe county, New York, of the first part, and M. B. Perine of Nunda, Livingston county, New York, of the second part, witnesseth :

“ That whereas the said Nathan English is the owner of a certain patent right known as Sipner's & Hooper's Patent Padlock, for the following counties, to wit: Allegany, Cattaraugus, Chautauqua, Livingston and Monroe, in State aforesaid. Now, therefore, the said English hereby agrees to engage in the sale of the said patent right with said Perine upon the following terms and conditions, viz. : The said English to furnish said patent, and the said Perine agrees to do all the work and labor to sell the same of the said territory, and to sell said patent right to the extent of said territory, or so much thereof as he can sell, the said counties not to be sold for less than \$300 cash, or negotiable promissory notes, payable in cash. The said Perine agrees to bear all expenses of and attending such sales, and in consideration of such labor and furnishing such expenses the same are to offset against the said patent right, and the proceeds of such sales are to be divided share and share alike, *i. e.*, each to have one-half thereof. If notes are taken, the same are to be payable to the order of English & Perine, and the said Perine is authorized to sign the name, if necessary, of English & Perine in transacting said business or anything incident thereto, and also to the end that said notes, if taken, may be converted into cash or other securities.

“ Witness the hands and seals of the respective parties this 8th day of January, 1872.

“ NATHAN ENGLISH. [L. s.]

“ M. B. PERINE.” [L. s.]

The referee held, as a conclusion of law, that the plaintiff was entitled to recover of the defendants the amount of said note, the sum of \$395.25, besides costs, and ordered judgment accordingly.

A. J. Wilkin, for the appellant.

S. H. Terry, for the respondent.

E. DARWIN SMITH, J. :

The promissory note upon which this action was brought was confessedly conceived in conspiracy and fraud, and was made and indorsed and put in circulation to deceive and to cheat. Passing apparently through a number of hands privy more or less to the fraud, or aware of the dishonesty of the transaction, it finally reached the hands of the plaintiff, who took it upon untrue representations in regard to it, but for a good consideration, and without notice of the circumstances under which it was made and put into circulation. The question is, whether the defendant English, who was the purposed victim of this conspiracy and fraud, who never, in person, signed or saw said note, or heard of its existence till he received notice of protest for its non-payment, is cut off from all defense to it on the ground that the plaintiff has thus acquired the rights of a *bona fide* holder thereof.

In the cases in which it has been held (and they are very numerous) that the holder of negotiable commercial paper, received before maturity in the ordinary course of business and for full value, is protected from almost every species of defense except that the instrument was void by statute, the paper had upon its face the genuine signature of the maker or indorser, or party sought to be charged. Such was the case of *Chapman v. Rose* (56 N. Y., 137).

In *Whitney v. Snyder* (2 Lans., 477), and *Foster v. Mackinnon* (L. R. [4 C. P.], 704), in which it was held that when the party did not intend to execute a promissory note, but a different instrument, if guilty of no laches or negligence he was not bound, the paper upon its face bore the genuine signature of the defendant.

The referee finds in this case that said note was indorsed by the defendant Perine, in the name of English & Perine, and delivered by him to Belden. He does not find that English and Perine were partners, but his findings for the plaintiff upon the law were doubtless made and based upon that assumption, upon his construction of the agreement set out in his report. This agreement does not constitute them partners. It is rather a power of attorney from English to Perine, to sell his patent right in the five counties named, with a provision to account to him and pay him half the proceeds of sales as a compensation for his services, with a special

power to convert the notes, if any were received on sales, into money by indorsement for that purpose. These parties never held themselves out to the public as partners, never did any business in a partnership name, and the fact of the making of this agreement was probably known only to the parties and to the persons concerned in getting up this note, and such persons as they may have communicated it to in furtherance of the scheme of fraud. The plaintiff testified that the defendant Mills informed him, when he transferred to him the said note, that English and Perine were partners in the manufacture of agricultural implements, which was an untrue representation. It is therefore clear that both the plaintiff and Mills, who are the only persons who as the holders of this note can have any pretense to be *bona fide* holders of it, did not take it with any knowledge of an actual partnership in fact between English and Perine, or upon any reputation of an actual partnership between them, based upon any acts or business of theirs, or derived from any holding of themselves out as partners to the public.

Where partners have been held liable upon negotiable paper fraudulently made or indorsed by one of the firm, the fact of the existence of such partnership has ordinarily been undoubted and notorious. In such cases any person of the vicinity might very properly receive the partnership paper, upon the presumption that it was lawfully made and in the legitimate business of copartnership. This presumption very reasonably protects the *bona fide* holders of partnership paper from any defense by the defrauded partners. But this principle will not protect the holder of negotiable paper, apparently made or indorsed by a copartnership against the forgery of such paper; and such I think the true defense to this note. Assuming that the contract between English and Perine, for certain purposes, constituted them partners as between themselves, neither of them had any authority to make promissory notes, or to indorse such notes in their joint names, except as expressly stipulated in said agreement. The indorsement of the name of English and Perine upon this paper was and is a simple forgery. Perine had no authority to make such indorsement. They were not general partners. Said note was not given or received in any partnership business. The said agreement simply authorized

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Perine to indorse notes received on the sale of patents. He had sold no patents. He did not receive this note on the sale of any patent or other consideration. He made the indorsement without the slightest pretense of right, to cheat and defraud English. At most he was the agent of English, under a special power to indorse particular notes.

In Parsons on Bills (vol. 2, 593), he says: "Authority to draw, make, or indorse a bill, may, of course, be given to an agent. When the agent signs the name of his principal without authority and with a malicious intent, it is a forgery." That is precisely this case. Bishop on Criminal Law (vol. 2, § 528) defines forgery as follows: "Forgery is the fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy." (4 Black. Com., 247; *Ree v. Taylor*, 2 East P. C., 852, 853.) The false making of a note or other instrument is forgery. (*Ree v. Parks*, 2 Leach [4th ed.], 775, 785; 2 R. S., 693, § 33.) Here was the making of a false indorsement, which was equivalent to making a false instrument with intent to defraud, etc. (*Ree v. Hart*, B. & H. Lead. Crim. Cas., 468.) This is a "false signature made with intent to deceive," which is the precise case stated by Justice EYRE, in *Ree v. Taylor* (*supra*), and cited with approval in *The People v. Fitch* (1 Wend., 200).

The judgment should be reversed and a new trial granted, with costs to abide the event.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment reversed, and new trial granted, costs to abide event.

CAROLINE W. CAMP, PLAINTIFF, v. ASHBEL H. BARNEY,
DEFENDANT.

Receiver of railroad — personally liable for his own misconduct — not for negligence of employes — Action against — amendment of judgment on appeal.

This action was brought against the defendant, who was operating and managing the Buffalo, Corry and Pittsburg railroad, as a receiver duly appointed by the United States District Court, to recover damages for personal injuries sustained by the plaintiff while traveling as a passenger on the railroad. Upon appeal

from a judgment recovered by the plaintiff upon the trial of the said action, *held*, that the record and proceedings should be modified so as to make the judgment against the defendant as receiver only, and not against him personally, and that, as so modified, it should be affirmed.

If, in such case, a receiver desires the protection of the court by which he was appointed, he must apply thereto for an injunction, and in case he fail so to do, the action at law may proceed as though permission to bring the same had been received from such court. (Per SMITH, J.)

A receiver is personally liable to persons sustaining loss or injury by or through his own neglect or misconduct; but for the neglect or misconduct of those employed by him in the performance of the duties of his office, he is only liable in an action brought against him as receiver, and any judgment recovered therein must be made payable out of funds in his hands as such receiver. (Per MULLIN, P. J.)

MOTION for a new trial, on exceptions taken at the Circuit and ordered to be heard at the General Term in the first instance. The action was brought to recover for personal injuries received by the plaintiff while she was being transported from the town of Brockton, in this State, to the town of Corry, in the State of Pennsylvania, upon a railroad between said places, operated by the defendant. The plaintiff recovered a verdict at the Circuit of \$1,250. The defendant was operating and managing said railroad as a special receiver of the Buffalo, Corry and Pittsburg railroad, in bankruptcy, duly appointed by the District Court of the United States for the northern district of New York.

E. C. Sprague, for the plaintiff.

Sherman S. Rogers, for the defendant.

E. DARWIN SMITH, J. :

By the order appointing the defendant receiver, he was vested with all and singular, the estate, franchises, property and effects, of every name and nature and description, belonging to the Buffalo, Corry and Pittsburg Railroad Company; and he was authorized to employ such assistants, operatives, mechanics, laborers and firemen as he might deem necessary; to purchase supplies; to borrow or hire such rolling stock, and make such running arrangements into connecting lines, as he should deem necessary; and to operate the railroad of said company from Brockton to Corry; and that he have all the usual

powers of receivers in like cases, as provided by the rules and practice of said court. At the close of the evidence in the case, the counsel for the defendant requested the court to decide, that inasmuch as the defendant was operating said railway as receiver only, and pursuant to the order aforesaid, he could not be made personally liable in this action for the injuries received by the plaintiff. The court refused so to decide, and the counsel duly excepted. The court then charged the jury that the defendant should be held in this action to the ordinary liability of a common carrier of passengers by railroad, and also that the defendant was to be treated in this action as if the defendant, at the time of the injury, had been carrying on said railroad for his own personal benefit and advantage. To both these propositions, the defendant's counsel duly excepted. These exceptions all present substantially the single point, whether the defendant, being in fact a receiver of said railroad, can be held personally liable to the plaintiff for the injury for which this action was brought. No reasonable doubt, I think, can exist, if the action had been brought against the defendant as receiver, by leave of the court appointing the defendant such receiver, that the action could be maintained. This point was distinctly decided by the Supreme Court of Ohio, in the case of *Mears, Administrator, v. Holbrook et al., Receivers, etc., of the Columbus, P. and I. R. R. Co.* (20 Ohio, 137). It was there held that the receivers were the governing power operating said railroad, and the only persons having authority to employ, direct, control and dismiss the various agents employed by them to operate said railroad, and that the various employes of the said receivers were their servants and agents, and they were responsible for injuries resulting from their negligence in the discharge of their duties assigned to them respectively. The ruling at the Circuit was doubtless made upon the ground that the defendant, being thus the acting, directing and governing power in operating said railroad, and the only tangible principal known to the public, the plaintiff had a right to hold him responsible for the discharge of the duty of the common carrier in respect to her, as assumed when he received her money in payment for her safe transportation over said railroad, and that the contract was formally and nominally with him personally. This view of the defendant's liability is held in several cases in the Supreme Court of Vermont.

In the case of *Blumenthal v. Brainerd et al.* (38 Vt., 407), the defendants were operating the Vermont Central and Vermont and Canada railroads, as receivers, under the appointment of the Court of Chancery of that State, and claimed, as the defendant does in this case, that they were only liable to account as officers of that court. The court held that the mere fact that the defendants were acting as receivers under the appointment of the Court of Chancery, could not be recognized as a defense to a suit at law for a breach of any duty or obligation which was assumed by them while acting as such receivers, and referred to the case of *Sprague v. Smith* (28 Vt., 425), where it was held that trustees operating a railroad and exercising its franchises, were responsible for the negligence of the operatives under their control. The same doctrine, in respect to trustees operating a railroad, was held in *Rogers v. Wheeler* (43 N. Y., 602; S. C., 2 Lans., 486); and in *Ballou v. Farnum* (9 Allen, 47). Executors and administrators also are personally liable upon all contracts made by them after the death of the testator. (*Herrin v. Myrick*, 41 N. Y., 315.) Receivers stand in the same general position with other trustees having an independent power of control in the affairs of business, and are primarily responsible for their affirmative acts and neglects and contracts, and for the negligence of those in their employ. The only exception in favor of receivers, or distinction between them and other trustees, is, that they are and officers of the court appointing them, and are under its control and protection. But this protection is only accorded to them on their own application, and is granted or refused by the court appointing them in its discretion, depending upon the circumstances of each case, as is held in the case of *Blumenthal v. Brainerd* (*supra*); Story's Equity, 833; and *Parker v. Browning* (8 Paige, 388); *Angel v. Smith* (9 Vesey, 336). The case of *Morse v. Brainerd et al.* (41 Vt., 551), illustrates and confirms this view. In that case an action at law was commenced against the defendants, who were in fact receivers, for the loss and damage sustained by injury to a carload of cattle transported over the road in charge of the said defendants as such receivers. That action was restrained by injunction from the Court of Chancery, and the cause of action was brought into that court and disposed of by a reference to a master. This was upon the assumption that it was no defense at

law, that the defendants were officers appointed by and acted under the authority of the Court of Chancery. If the receiver in such case, seeks the protection of the court by which he was appointed, he must, in proper form, invoke such protection by injunction; and it follows I think, in such a case, that if the receiver does not ask for such protection from the proper court, the action may proceed against him at law, and he must be deemed to have waived, if need be, such ground of objection to the action, or to have voluntarily elected to defend the action at law to the same effect as if leave had been given by the proper court to the institution of such suit at law. The Supreme Court of Massachusetts recognized this principle in *Paige v. Smith* (99 Mass., 395) and held, as the defendants were liable to be sued at law in Vermont, they must be held so liable in that State. The action in this case was a proper one to be tried at law, and if application had been made to the District Court to restrain the action, I should think that court might very properly have refused such order and allowed the cause to proceed to trial and judgment at law, and have directed the receiver to defend the same and abide by the decision of the court; and if it were of any practical consequence, I do not see why the record might not now be amended, and the judgment be entered and affirmed as against the receiver in form, to the same effect as if he had in fact been sued as receiver.

MULLIN, P. J. :

A receiver is personally liable to persons sustaining loss or injury by or through his own neglect or misconduct. For the neglect or misconduct of those employed by him, in the performance of the duties of his office, he is not personally liable. The action in such a case must be brought against him *as receiver*, and the judgment, if a recovery is had in the action, must be made payable out of the fund in his hands as receiver. Divesting the owner of his property, and vesting the title and possession of it in another, is the exercise of sovereign authority, whether it is exercised by the legislature itself, or by the courts of equity or of law or other agent; and the receiver when appointed is the same agent of the power appointing him, and, like all public agents, is

not personally liable for acts done in the legitimate business of the agency. The judgment in the case is, in my opinion, erroneous, and should be reversed. But as it is within the power of the court to allow the proceedings to be amended so as to make the suit a suit against defendant *as receiver*, and the judgment payable out of the fund in the hands of the receiver, instead of by him personally, I am in favor of allowing the amendment; and as amended the judgment should be affirmed.

MORGAN, J., thinks that the action cannot be maintained against the defendant personally, but concurs in the opinion that the record and proceedings may be amended so as to make the judgment against the defendant *as receiver*, and in that shape, affirmed.

Ordered, that the record and proceedings be amended so as to make the suit and judgment against the defendant *as receiver*, and as so amended, judgment affirmed.

NATHANIEL S. GILBERT, RESPONDENT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, APPELLANT.

Delivery of property to carrier — when title vests in consignee — Demand.

The plaintiff entered into an agreement with Park & Co. of New York, by which he was to fill certain casks furnished by them, with cider, have them loaded upon the cars at Lockport, each car to contain fifty casks, take a receipt therefor, and transmit that, with a draft for the price, to the purchasers. After certain of the casks had been delivered to the defendant, and while it was waiting for enough to fill a car, eleven of them were found to be missing. *Held*, that the title to the cider did not vest in the purchasers until a car was loaded and a receipt taken; and that plaintiff was entitled to maintain an action for the cider. In such a case no demand need be made before commencing the action.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The action was brought to recover the value of eleven casks of

cider delivered to the defendant, to be transported to New York. It appeared that the casks in which the cider was placed, were sent to the plaintiff by Park & Co., the owners of them, to be filled with cider and then returned to them over the defendant's road, from Lockport to the city of New York. The arrangement was, that plaintiff should deliver the cider in the casks at the defendant's depot in Lockport, and have it loaded upon a car; each load to consist of fifty casks, take a shipping receipt for the cider when so loaded, and transmit that, accompanied by a draft for the price, to the purchaser. After a portion of the cider had been received by the defendant at its freight-house at Lockport, and while it was waiting for casks enough to be delivered to fill a car, it was discovered that eleven of the casks first delivered were missing. This action was brought to recover the value of the cider so lost.

Laning & Willett, for the appellant. The cider had been sold and delivered to Rufus Park & Co., according to the terms of sale, and the plaintiff had neither title nor possession of any of the property lost, at the time such loss occurred. (*Groat et al. v. Gile*, 51 N. Y., 431-437; *Olyphant v. Baker*, 5 Denio, 379, 382; *Terry v. Wheeler*, 25 N. Y., 520, 525; *Waldron et al. v. Romain*, 22 id., 368; *Krulder v. Ellison*, 47 id., 36; *Thompson v. Fargo*, 49 id., 188; *Rogers et al. v. Wheeler et al.*, 52 id., 262, 266.) If the cider was received by the defendant as warehouseman, then the plaintiff could not recover, no demand having been made for the property. (*Whitney v. Slawson*, 30 Barb., 276; *Brown v. Cook*, 9 Johns., 361.)

Thomas M. Webster, for the respondent. No demand was necessary. The defendant was requested to ship it, and failed to do so, and the plaintiff had to replace the cider for shipment. (*The Bank of Rochester v. Jones*, 4 N. Y., 497; *Jones v. Bradner*, 10 Barb., 193.)

MULLIN, P. J. :

So far as DANIELS, J., considered the questions arising in this case, I entirely concur with him in his opinion, delivered on

deciding the motion for a new trial. There are two or three points not discussed by him, which it may be proper to consider briefly.

The appellant's counsel insists, in his points on the argument of the appeal, that on delivery to the defendant of the barrels of cider that have been lost or mislaid, the title vested in Park & Co., the consignees, and that thereafter the plaintiff had no interest in the property.

It was competent for the parties to the sale to agree as to what acts should be done by the vendor before title should vest in the purchaser; and until such acts were done the title would not pass. (*Kelley v. Upton*, 5 Duer, 336; *Story on Sales*, § 296, *a.*) The title to property does not pass upon the completion of a contract of purchase and sale, until delivery of the property, unless it is so intended by the parties. (*Macomber v. Parker*, 13 Pick., 178; *Reddle v. Varmer*, 20 id., 280; *Olyphant v. Baker*, 5 Denio, 379.) It is manifest in this case that such was not the intention of the parties. No credit for the price was contemplated, yet, if the title passed, the plaintiff could not have sued for the price until he had not only delivered the property to the defendant, but had it loaded on the cars and obtained its receipt for the same on account of the purchaser. The title might pass to the purchaser, and yet, by the agreement, the purchase-money not be payable until the happening of some future event, or until the performance of some act by the vendor.

In the absence of any such specific agreement as to delays of payment, and further acts by the agreement to be performed by the vendor, will not the law presume that it was the understanding of the parties that title should not pass until the performance of those acts, rather than that the agreement was that title should pass and payment be postponed? It seems to me that it would.

The defendant was not liable to the plaintiff as a carrier. The cider was not to be carried for him, but for the purchaser. Until the title passed to the purchaser, the cider belonged to the plaintiff, and defendant held it as warehouseman merely. When the title passed it held the property as carrier for the consignee. (*Lakeman v. Grinnell*, 5 Bosw., 625; *Blossom v. Griffin*, 13 N. Y., 569; *Coyle v. Western R. R. Co.*, 47 Barb., 152.)

When property is sold to be shipped by cars or other public conveyance, ordinarily the title passes on delivery to the carrier; but, as I have already suggested, it was competent for the parties to agree upon the acts which the vendor should perform before the title passed; and in this case the title did not pass until defendant's receipt was obtained; and as, by the arrangement between the plaintiff and defendant, the cider was to be shipped by the carload, and the car held fifty barrels, the receipt could not be required by the plaintiff until the fifty barrels were put on the car.

Upon the evidence in the case, no demand of the cider was necessary before suit. It was placed, by the direction of the agents of the defendant, on a platform, erected for the deposit of property intended to be forwarded by its cars. Upon such delivery it became responsible for it; and it was clearly established that eleven barrels were delivered to it which it did not account for; five of which, it seems to have been conceded, were carried off by some person other than the plaintiff; and the remaining six were shown to have been delivered, if Shook was believed; and which defendant's agent conceded could not be. No demand under such circumstances was necessary.

The judgment and order refusing a new trial must be affirmed.

Judgment and order affirmed.

IN THE MATTER OF THE APPLICATION OF THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, APPELLANT, FOR THE APPOINTMENT OF COMMISSIONERS
TO APPRAISE LANDS OF JAMES SWEENEY AND OTHERS,
RESPONDENTS.

Railroad Co. — chapter 237, Laws of 1869 — proceedings to take land after completion of road — what petition must contain.

Where a railroad company, after having located and completed its road, institutes proceedings, under chapter 237, Laws of 1869, to acquire title to other lands necessary for the convenient transaction of its business, the petition need not

state all the facts which are required in the original petition; nor is it necessary to make and file the maps which are required when the company first applied to acquire lands for its road.

APPEAL from an order made at the Special Term, denying the petitioner's application for the appointment of commissioners to appraise the compensation to be paid for certain lands of the respondents, sought to be taken by the petitioner for railroad purposes.

A. P. Laning, for the appellant.

E. C. Sprague, for the respondents.

MULLIN, P. J. :

The land proposed to be taken is a triangular strip lying in North Tonawanda, between the track of the said petitioner's road, which runs from Buffalo to Niagara Falls, and the track of said company's road, running from Tonawanda to Batavia. The petitioner alleges that it desires to connect these tracks, by a track laid upon a curve extending from the one line to the other, and that such new or proposed road or track would pass over the triangular piece of land above mentioned. The persons interested in the lands, in answer to the petition, allege that the said land is not necessary for the purposes of petitioner's incorporation; that the line or route of the railroad of petitioner has never been located over or upon the lands in question, or any part thereof; that no notice has ever been served upon them, or either of them; that no map or profile of the intended route has ever been made or filed, nor has any notice been given to the parties interested in said land that it was intended to locate the route of said road over said land; that the land in question is not in the located or adopted route of said road, and that such route has not been changed.

The issues joined by the petition and answers thereto, were tried at a Special Term held in the city of Buffalo; and for the purposes of the trial, it was admitted by the parties:

First. That the land described in the petition is not embraced within the route of the petitioner's road, laid out and designated on the map of the route adopted by it.

Second. The line of said road does not pass over or through the premises in question.

Third. The line of said road has not been changed so as to pass over or through the said premises.

Fourth. That petitioner seeks to obtain said land to build a line connecting the Niagara Falls branch with the Batavia and Tonawanda branch.

Fifth. The said premises are not necessary for the purposes of petitioner's road as now constructed and operated, except for the purpose of making the connection aforesaid. If such connection is not made at the point proposed, the land in question is not required for the purposes of the petitioner's incorporation; but it is necessary for the purposes of petitioner's incorporation, that such connection be made.

After hearing the parties and considering the evidence, the court dismissed the petition with ten dollars costs.

It being conceded by the parties that it was necessary for the purpose of petitioner's incorporation, that the tracks of its two branches should be connected, and it not being alleged or shown that a track to connect them could be laid over other lands in the vicinity so as to produce less injury to the owners of the land than is done to the owners of the land in question, we must assume that the court dismissed the petition because the petition did not set forth the matters required to be alleged therein by the general railroad act, and the acts amendatory thereof.

The question for us to consider on this appeal is, whether, when a railroad company has located its road and completed it, and complied with the requirements of the statute in acquiring its lands, and it becomes thereafter necessary for the convenient transaction of its business, and in furtherance of the object of its incorporation, to acquire additional land, it must allege in the petition presented in order to acquire such additional land, the same facts which are required to be alleged in the original petition, and to make and file the same maps, etc., required to be made and filed when it first applied to acquire lands for its road.

Section 14 of the general railroad act of 1850, required the company to state in its petition:

First. A description of the land sought to be acquired.

Second. That the company is duly incorporated; that it is its intention, in good faith, to construct and finish a railroad between the places mentioned in its charter.

Third. That the capital stock has been in good faith subscribed.

Fourth. That the line of its road has been surveyed, and a map or survey by which such line is designated and located according to such survey, and filed certificates of such location, signed by a majority of the directors, in the clerk's offices of the several counties.

Fifth. That the land described is required for the purpose of constructing or operating its road, and that the company has not been able to acquire title thereto, and the reasons for such inability.

Sixth. The names and residences of the owners, and whether any are infants, etc.

It will be seen that there is not in this section, nor is there in the act of 1850, any manifestation of an intention to allow railroad companies incorporated under it to acquire lands, except for its main line and appendages. After it has completed its line, its power to acquire land is at an end under the original act, except in cases where the title acquired has failed; then by section 21, of the act of 1850, it may proceed to acquire other lands. Chapter 237, of the Laws of 1869, remedies this omission, if it was one, in the general law, and authorizes railroad companies, at any time after the construction of any railroad operated by steam, to acquire land for the purposes of its incorporation, or of running and operating its road, in addition to what it has already acquired, by purchasing the same, or by paying such damages to the party injured as may be agreed upon; but if the company for any cause shall be unable to agree for the purchase of such lands, it may proceed to acquire title, and to ascertain and appraise damages in the manner and by the proceedings in said act prescribed.

The whole question turns upon the construction to be given to the last clause above cited. Did the legislature mean, and is it the reasonable construction of this clause, that the petition to acquire a few rods of land for the purpose of placing upon it a wood-shed or water-tank, or for a ditch to convey water, etc., or to fence the land of the company, shall contain the same allegations as are required to be made in the original petition, and the same or any maps to be

filed, as are required to be made and filed upon such original application.

Why should the petition to acquire additional land, allege that it is the intention to construct and finish a railroad between the termini mentioned in its charter. Such an allegation would be untrue, wholly irrelevant to the proceeding, and of no benefit to either the company or owners of the land. Would it benefit either party to allege that the capital stock had been subscribed for, or that its main line had been surveyed, or map of it made and filed? Most clearly it would not. Such allegations have no relation to the new proceeding, and unless clearly and imperatively required to be made, they ought to be omitted, and the petition is valid without them. The object in view, in requiring the railroad company to survey and locate its line, and file maps thereof, before applying to acquire title to land, is to enable owners to know where it crosses their lands, and thus enable them to ascertain the extent of the damages done thereto by the construction of the road. Such a consideration has no application to proceedings to acquire a few rods of land, and as to which the damages would be the same in whatever manner the track crossed it. The company, as I understand the petition, desires to appropriate the whole of the lots described in the petition.

I do not intend to hold that the petition required by the act of 1869 may contain one set of allegations when the land is a large parcel, and other and different ones when it is a small parcel. What I do intend to hold, is, that allegations may be omitted in petitions under the act of 1869, which are essential in the act of 1850. In construing these acts, regard must be had to the end to be attained by them, rather than to the words of the act.

The only map that could reasonably be required to be filed, would be one showing the location of the road over the lands proposed to be taken, but that is not the map required to be filed by the act of 1850.

I am of the opinion that the order should be reversed, and proceedings remitted to the Special Term, with directions to appoint commissioners. The question being a new one, costs are given to neither party.

Ordered accordingly.

MARY A. CLEMENCE, PLAINTIFF, v. THE CITY OF
AUBURN, DEFENDANT.

Sidewalks — steepness of grade of — liability of city for injuries occasioned by.

The common council of the city of Auburn having established the grade for a portion of one of the sidewalks therein at three-quarters of an inch to the foot, it was found that, at the junction of the old with the new sidewalk, there was a difference of level of six inches; to obviate which, the common council directed that the stone joining the new with the old sidewalk be laid on a slope of six inches in about three and one-half feet. The plaintiff, in passing along the said sidewalk, at a time when the said stone was covered with about one inch of snow, slipped thereon, fell and was injured. *Held*, that it was negligence on the part of the city to have this stone so laid, and that it was liable to the plaintiff for the injuries sustained by her.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a nonsuit directed by the court.

George F. Comstock, for the plaintiff. A city is not liable for not constructing public improvements, and the question of whether they shall be constructed is a judicial discretion, but after having decided to construct and undertake the improvements, then the corporation acts ministerially, and is liable in damages to the person injured by the unskillful, negligent or unsafe construction of them, or failure to keep them in proper condition. (*Shearman & Redfield on Negligence* [3d ed., 1874], 183, § 124; 4 *Abbott's Digest* [new ed.], 460, § 144; *The Rochester White Lead Co. v. The City of Rochester*, 3 Comst., 463; *Huston v. The Mayor*, 5 Seld., 163; *Conrad v. The Village of Ithaca*, 16 N. Y., 158; *Weet v. The Trustees of the Village of Brockport*, 16 id., 161; *Barton v. The City of Syracuse*, 37 Barb., 293; affirmed, 36 N. Y., 54; *Leventhal v. The Mayor of New York*, 61 Barb., 511; Alb. L. J., Dec. 26, 1874, pp. 401-403, article "Municipal Corporations.") The city is bound to construct the sidewalks safely and properly, and to maintain them in such condition that they shall at all times be safe for the traveler. (2 *Dillon on Municipal Corporations*, 911, 712, §§ 789, 790, 791; *Whart. on Neg.* [1874], § 772; 4 *Abbott's Digest* [new ed.], 285, § 35; *Wallace v. New York*, 18 How., 169; *Morey*

v. *The City of Troy*, 61 Barb., 589; *Allentown v. Kramer*, 73 Penn., 406; *Chicago City v. Robbins*, 2 Black, 422; Cook's Highway Laws, 1870, p. 205.)

James Lyon, for the defendant.

MULLIN, P. J.:

The plaintiff is a resident of the city of Auburn. On the 3d February, 1872, she was passing along the sidewalk on State street, in said city, and slipped and fell and injured the ulnar nerve of the arm, by reason whereof she has suffered a good deal of pain, and was for several months unable to perform her ordinary labor, and the arm was not, at the time of the trial, able to raise any considerable weight, and in the opinion of the physician, will never be restored to its normal condition.

Some four or five years before the accident, the owner of the lot in front of which this walk was laid, desired to relay and repair it, and applied to the chairman of the street committee of the common council to fix the grade of the sidewalk. A grade was established having a descent of three-quarters of an inch to the foot. It was ascertained that if this grade was continued to a certain point in the walk, there would be a difference of six inches between the new grade and the walk immediately adjoining. This fact being communicated to the chairman of the street committee, he directed that the stone which was used to fill up the gap between the new and old grades, be laid on a slope, having a descent of six inches in about three and a half feet.

On the day of the injury it had snowed in the morning so that at the time the plaintiff was passing along the walk in question, there was some half an inch of snow on the walk, which concealed the descent so that a person unacquainted with the grade would not be likely to observe it. The plaintiff not perceiving it stepped upon the stone in question, and immediately slipped and fell and was injured.

On the trial the defendant moved for a nonsuit on two grounds:

1st. Because the plaintiff was shown to have been guilty of negligence that contributed to the injury.

2d. That in establishing the grade of sidewalks, the common

council act judicially, and if the walk is laid in accordance with the grade so established, the city is not liable.

On this ground the court nonsuited the plaintiff. The court directed the motion for a new trial to be heard in the first instance at the General Term.

By the charter of the city of Auburn the common council has power, and it is made their duty, to make, repair and preserve the highways, streets, lanes, alleys, bridges, side and crosswalks, and to cause them to be repaired from time to time. (*Laws 1859, chap. 431.*)

To make or repair sidewalks in said city, the common council is required to give notice in writing to the owners or occupants of lots in front of which sidewalks are required to be made or repaired, specifying the work to be done, and the manner and time in which the work is to be done.

The repairs were made in conformity to the directions of the chairman of the street committee, whose power to give directions is not questioned.

It does not require argument to prove that a walk, having in it a stone laid upon the grade having a descent of six inches in the distance of three and a half feet, is dangerous to persons not aware of such grade. It is the duty of those charged with the construction of the streets and sidewalks, to see that they are so made and kept as to be safe for all persons passing along the same on foot, on horseback, or in carriages; and if this duty is not performed, and injury results from the omission, the municipality is liable to respond in damages to the person injured. (*Wallace v. The Mayor*, 2 Hilt., 440; *Clark v. City of Lockport*, 49 Barb., 580.) The common council of Auburn may establish such grade for its streets as it sees fit, and it is not responsible for an error of judgment in establishing such grade. (*Rochester White Lead Co. v. City of Rochester*, 3 Comst., 463; *Lloyd v. The Mayor*, 1 Seld., 369.) But this exemption from liability does not relieve the city from liability, if, in sinking or repairing the street or sidewalk, it is left so as to be dangerous to the life or limbs of persons passing over it. (4 Abb. Dig., 460, § 144; *id.*, § 153; *Barton v. Syracuse*, 36 N. Y., 54.) Whether a walk shall be on the same level with the street, or a foot above or below, rests in the discretion of the common council,

and they are not liable for error of judgment, if they have failed to establish the best grade. But they are liable if they leave a hole in it or a sudden descent, by reason of which persons are injured without fault or neglect on their part. (*Rochester White Lead Co. v. City of Rochester, supra.*) There is no immunity for such a wrong. Officers charged with the care and preservation of the streets and walks of a city, must be held to a rigid accountability when they omit to do whatever is necessary to protect the public from injury by reason of defects in such streets or walks. In no other way can life or limb be properly protected against gross neglect or the meanest parsimony.

The nonsuit must be set aside, and a new trial granted, costs to abide the event.

New trial ordered, costs to abide event.

HENRIETTA HARWOOD, RESPONDENT, v. NATHANIEL
KEECH, APPELLANT.

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Slander — privileged communications — malice — how proved.

Statements made by a resident of a school district, having a daughter whom he wishes to send to school, to the trustees of the district as to the bad character of a woman proposed to be employed as a teacher, are privileged, and no recovery can be had therefor without proof of express malice.

Malice is implied from the utterance of slanderous charges not justified or privileged, and a denial of malicious intent is of no avail.

To authorize a recovery in cases where the communications are alleged to be privileged, it is sufficient to prove that the defendant knew the charge to be false.

APPEAL from an order denying a motion for a new trial made upon a case and exceptions.

This is an action for slander. The plaintiff complained that the defendant charged her with being a person of unchaste character. The defendant alleged that he was a resident of the school district in which the plaintiff taught; that his daughter attended plaintiff's

school; and that the statements were made by him to the trustees of such school district, and were privileged.

Morris & Leary, for the appellant.

E. G. Lapham, for the respondent.

MULLIN, P. J. :

The defendant being a resident of the school district in which it was intended to employ the plaintiff as a teacher, and having a daughter that he desired to send to said school, it was not only his right but his duty, if she was a woman of bad character, to communicate to the trustees such information as he possessed in reference to her character, and the communication thus made was privileged, and plaintiff could not recover without proof of express malice. (*Thorn v. Moser*, 1 Den., 488; Starkie on Slander [Wend. ed., 1843], chap. 10-13; Townsend on Slander, § 209, and note 1004; *Cockayne v. Hodgkinson*, 5 C. & P., 543.)

To prove malice, she called the persons by whom defendant says he was told the matters communicated to the trustees, and they testified that they never told him any of the matters relating to plaintiff's character, that he said they had. (Townsend, §§ 240, 241, and notes 1203 and 1209.) It was false, then, that he had been so told by the persons named by him. He disclaimed any personal knowledge in relation to the plaintiff's character, and hence the jury had the right to find that he did not believe the charges he made against her; as he could not believe them without some evidence of their truth. Had plaintiff been told as he claims to have been, he would not be liable, notwithstanding the charges were unfounded. The communication to the trustees would then have been a privileged one; but the known falsity of the charge took from the statement to the trustees the immunity given to a privileged communication, and subjected the defendant to liability for defamation. (Townsend, § 241, and notes 1214-1224.)

The defendant swore that the persons named by him informed him of the matters he charged against the plaintiff's character, as did one or two other witnesses. But the jury did not believe him or his witnesses. Their finding is, of course, conclusive on that subject.

Had the defendant the least confidence in the truth of these stories he claimed had been told him about the plaintiff, he would at least have called the three boys who claimed to have seen her having sexual intercourse with Hazelton in the school-house, but he did not venture to do that, and thus save himself from the imputation of having maliciously slandered an unoffending girl, who was endeavoring, by honest labor, to earn a living. The charges were the most infamous that a man could invent against a woman. He struck at her in a way most fatal to her reputation. It was put forward as prompted by the defendant's zeal for the welfare of the district, when he knew it was false, and could have no other effect than to wound and ruin her.

But this defendant did not limit his communication to the trustees. He made the same imputation against the plaintiff in the presence and hearing of others, as to which there is no shadow of claiming them to be privileged. (Townsend, § 243; *Thorn v. Moser*, 1 Den., 188; *Burlingame v. Burlingame*, 8 Cow., 141; *Sewall v. Catlin*, 3 Wend., 291.)

It only remains to inquire whether any errors were committed in the rulings of the court, on the trial or in the charge to the jury.

The first error relied on, was in refusing to allow the defendant to answer the question: "Did he [Lamb] inquire of you [as to the charges against the plaintiff], or did you introduce the subject?" It was wholly immaterial whether the defendant was asked to make the statement or whether he volunteered it. In either case it was privileged, unless proved to be made maliciously.

Defendant was asked whether he had any purpose or thought of injuring the plaintiff. The court refused to permit the question to be answered. Slander is not one of the cases in which a defendant can relieve himself from liability for a slanderous charge by denying malice. As well might he be permitted to disclaim it upon the trial of an indictment for an offense in which malice is an element.

In actions of slander, malice is implied from the utterances of slanderous charges, not justified or privileged, and in such cases a denial of malicious intent is of no avail; the law presumes it, and the presumption cannot be rebutted by the slanderer denying it.

In cases where the communication is claimed to be privileged, and the burden of proving malice rests on the plaintiff in order to recover, and it is proved that the defendant knew the charge to be false, the law again implies malice, and the defendant cannot rebut it. But where there is no direct proof of the known falsity of the charge, but it is sought to be established by facts and circumstances, then it is competent for defendant to disclaim a malicious intent. (*Feidler v. Darrin*, 50 N. Y., 437, 443.)

If, however, the evidence of the defendant as to intent, was competent at the time it was offered, a new trial should not be granted, it being established by the subsequent evidence in the case, that the slander was uttered to others besides the trustees, and to whom there could be no pretense of privilege.

The exception to the charge is in these words: The defendant's counsel excepted to each and every part of the charge, which reads as follows. The counsel then sets out several distinct propositions, and he desires now to avail himself of an exception to each proposition. This he is not entitled to do, unless the whole portion of the charge excepted to is erroneous. Without entering upon an examination of the several parts of the charge excepted to, it is sufficient to say, we do not think the charge erroneous as to all or any of them.

The order refusing a new trial is affirmed.

Order affirmed.

THE SYRACUSE, PHOENIX AND OSWEGO RAILROAD
COMPANY, RESPONDENT, v. R. NELSON GERE, APPEL-
LANT.

Chapter 140, Laws of 1850 — Subscriptions to stock of railroads — check taken as cash — agent to procure subscriptions — power of.

The defendant, having been applied to by an agent employed to procure subscriptions to the stock of the plaintiff, gave his check for the ten per cent, required by the act of 1850 to be paid in cash, upon the express agreement that he should never be called upon to pay the same. In an action brought by the company upon the check, *held* (1), that the taking of the check for the ten per cent required to be paid in cash, was not such a violation of the act as

to render it void; (2), that the agent had no authority to bind the company by his agreement in regard to the liability of the defendant upon the check.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

The action was brought to recover the amount due upon a check given by the defendant, payable to the order of the treasurer of the plaintiff.

Chamberlin & Knapp, for the appellant.

Hiscock, Gifford & Doheny, for the respondent. The arrangement not to enforce defendant's subscription is not a defense, but is a fraud upon the statute, upon defendant's associates, upon all stockholders that might thereafter take the plaintiff's stock, and a fraud upon the public. (See *Graff v. Pittsburgh and Steubenville R. R.*, 31 Penn., 489; *Robinson v. Pittsburgh, etc., R. R. Co.*, 32 id., 334; *Litchfield Bank v. Church*, 29 Conn., 137; *Downer v. White*, 12 Wis., 176; *Kennebeck and Portland R. R. Co. v. Waters*, 34 Me., 369; *Blodgett v. Morrill*, 20 Vt., 510; *Tuckerman v. Brown*, 33 N. Y., 297, and cases there cited.)

MULLIN, P. J. :

The plaintiff sued defendant on a check for \$100, which was given for the ten per cent required by the general railroad law, to be paid upon each share of stock of a railroad company, at the time of subscribing therefor. The defense is, that before organization of the company, Patrick H. Agan was engaged with others in procuring subscribers to plaintiff's stock, with the view of organizing a corporation, under the general railroad law, to construct a road from Liverpool, in Onondaga county, to connect with the New York Midland, in Volney, Oswego county. P. H. Agan applied to defendant to subscribe, and, as an inducement to do so, he assured him he would not be called upon to pay anything upon the subscription; and the defendant gave his check for the ten per cent required to be paid in cash, upon a bank in which he notified Agan he kept no account, and that it would not be paid, and Agan agreed that it should not be presented. It was drawn upon that bank that it should not be paid if presented.

The court gave judgment for the plaintiff, and the defendant appeals.

There are but two questions of any importance arising on this appeal. The first is, whether taking it for the ten per cent was such a violation of the statute as rendered it void; second, whether the plaintiff acquired such a title to the check as enables it to sue upon it.

First. Is the check void? The second section of the general railroad law (3 Statutes at Large, 618), provides that the articles of association shall not be filed and recorded in the office of secretary of State until at least \$1,000 of stock for every mile of railroad proposed to be made is subscribed thereto (that is, to the article of association), and ten per cent paid thereon in good faith and in cash to the directors named in the articles of association.

In *Crocker v. Crane* (21 Wend., 211), the question was, whether the acceptance of checks in lieu of cash was a compliance with the provision of the charter, which, in that case as in this, called for a percentage to be paid in cash at the time of subscribing. It was held it was not, as in that case the commissioners for distributing the stock received checks or uncurrent money for the percentage of a large number, if not all the subscribers. The action of the commissioners was held to be void, as contrary to the policy of the statute. COWEN, J., who delivered the opinion of the court, says (p. 220): "Why are they [checks] taken as cash in the ordinary course of business? Because they are a mere transfer of money which a man has at his banker's. I do not deny that receiving an occasional check might have been a fair substitute." The assistant vice-chancellor, in *Thorp v. Woodhull* (1 Sandf. Ch., 411), held that the receipt, by the commission appointed to receive subscriptions for, and to distribute the stock of an insurance company, of a check of a subscriber, in payment of a percentage required by the charter to be paid in cash at the time of subscribing, was a proper exercise of power, and the drawer was liable on the check; and he considers the receipt of the check valid, because it was received as cash. It did not appear that the commissioners had any knowledge or suspicion that the check was not good, or that it would not be paid in due course. They received it at their own risk. It seems that the corporation took it from them as equivalent to cash, and it is not

proved but that the commissioners and the officers of the corporation believed it to be equivalent to money. He further says, that "it does not appear that a check was taken from any other subscriber for stock." The considerations that induced the vice-chancellor to hold the subscription valid in this case before him, apply in all their force to the case before us. There is no evidence that a check was received from any other person than the defendant, or that the directors had any knowledge of the understanding between Agan and defendant, that the check should not be presented or paid, or that the cash to pay it was not in the bank to meet it when presented.

If the directors or the company were bound by the acts and agreement of Agan in the premises, the check must be held void, unless defendant is not in a situation to avail himself of the fraud which was committed, or attempted to be committed, upon the company or its stockholders. There is no proof of the authority given to Agan. We must ascertain it, therefore, from the nature of his employment and the duties which it was probably intended he would perform.

The general railroad act contemplates that persons desiring to subscribe for stock, shall meet together, and agree upon and sign the articles of association, and subscribe for stock. This meeting is made up of persons invited by one or more persons friendly to the enterprise, with the view of inducing them to subscribe for stock, and to become corporators in the company, and some times to take subscriptions to be presented to the directors when appointed. This is all the duty a person so employed, in the absence of instructions clothing him with more enlarged powers, is expected to perform, or it is necessary he should perform.

Agan had no power to make the arrangement set up in the answer, and if he made it, neither the directors nor the company were bound by it. It is not to be assumed, in the absence of the clearest proof, that the subscriber to the stock, before the organization of the company, or the directors, after that event, would deliberately authorize the doing of an act that would destroy the subscription of any one or more of the subscribers, and endanger the existence of the company after incorporation.

Second. Has the corporation a right to maintain an action on the

FOURTH DEPARTMENT, APRIL TERM, 1875.

check? In other words, was the check ever legally transferred to the company? Although the statute contemplates and permits subscriptions to the stock of a railroad company before incorporation, yet these subscriptions do not bind the subscribers until the company becomes incorporated. When that event occurs the subscription becomes the property of the corporation, and it alone can sue thereon. If it was competent to receive a check for the ten per cent required to be paid down at the time of subscribing, that check becomes the property of the company, at the same time and in the same manner it would have become owner of the money, had it been paid in lien of the check.

It does not matter, it seems, to whom the check was made payable. It was transferred to the company upon incorporation, just as land intended to be granted for the use of a religious society becomes the property of the corporation upon the incorporation becoming complete.

The judgment must be affirmed.

Judgment affirmed.

AARON PLYMPTON, APPELLANT, v. ERNST A. BOEHME
AND WIFE, RESPONDENTS.*

Contract of sale of real estate — rights of assignees of — interests therein as between each other.

When a contract for the sale and purchase of land is assigned by the purchasing party to two persons, so that each becomes entitled to a one-half interest therein, *held*, that if one of such persons pay to the owner of the land the entire contract-price and take a conveyance thereof to himself, he is bound, on being tendered by his co-assignee one-half of the purchase-money, to convey to him a one-half interest in the land.

APPEAL from a judgment in favor of the defendants, entered on the report of a referee.

J. Horr, for the appellant.

E. A. Nash, for the respondents.

* This and the two following cases were decided at the January term, 1875.

MULLIN, P. J. :

Gideon Granger, at the time of his death, was owner in fee of the premises in question in this suit. By his last will, Francis Granger was appointed trustee for the sale of the real estate of which he died seized. Said trustee, on the 8th of April, 1868, contracted to sell and convey the land in question to Emily Beebe, for the sum of \$2,705, to be paid as follows: \$500 down, and the balance in six annual payments with interest, and upon the payment of \$1,500 and all interest due, he was also to convey the said land to said purchaser, and take from her a bond for the unpaid purchase-money, secured by a mortgage on said premises. On the 13th of January, 1869, Mrs. Beebe, in consideration of \$1,600 to her paid by William Gleason and James McCurley, assigned to them all her right, title and interest in said contract and in and to all moneys paid thereon, and she delivered possession of said premises to said assignees, and they paid the interest on the contract for the years 1869 and 1870. On the 7th of November, 1870, Gleason, for a valuable consideration, assigned his interest in said contract to Van Rensselaer Bates. On the 14th of February, 1871, Bates, for a valuable consideration, assigned his interest in said contract to the plaintiff in this suit. The defendant Boehme became owner of the interest of McCurley in said contract, but at what time does not appear.

At some time prior to May, 1871, Francis Granger died, and James C. Smith was appointed trustee in place of said Francis. Prior to the 8th of May, 1871, the plaintiff tendered to said Smith one-half of the amount due on the said contract of Mrs. Beebe, and demanded a conveyance of one-half of said premises. Smith refused to convey one-half, but proposed to convey them wholly to the plaintiff, if he would pay the balance due on said contract, and that he would notify the other party interested in the contract to pay up the amount due, or he would forfeit the contract, and then he would convey to plaintiff. Smith finally extended the time for such other owner to pay in. The plaintiff again tendered one-half the amount due, and again demanded a deed, but Smith declined to give two deeds of said premises, or to convey them to two persons, but, on the 8th of May, 1871, did convey the whole of them to defendant Boehme; and the plaintiff subsequently, and before

bringing this action, tendered to Boehme one-half the amount paid by him on said contract and a bond of indemnity against the mortgage he had given for part of the purchase-money to Smith, but Boehme refused to receive it and convey one-half to plaintiff, and then this action was brought to compel such conveyance.

The referee to whom the issues were referred for trial, nonsuited the plaintiff, and judgment of nonsuit was accordingly entered, and from it plaintiff appeals. In justification of the nonsuit, the respondents' counsel insists in his first point that Bates, plaintiff's assignor, acquired no interest in the contract, as the assignment was without consideration; that it was \$100, and that was never paid to Gleason, the assignor. I find no color for such a proposition. The assignment in terms recites a valuable consideration, and there is not a word of evidence tending to show that the recital was not true. In a separate instrument, but attached to or written on the same paper with the assignment, it is said that \$100 was deposited in the hands of one Decker, to be paid in a certain contingency to Gleason, but it is stated at the close of the case, that the partition suit out of which the contingency referred to arose, was discontinued before the assignment of Bates to the plaintiff, and that transaction has therefore no connection with this case.

The plaintiff then must be taken to be, by virtue of the assignment from Bates, the owner of one-half the interest of Mrs. Beebe in the contract from Granger. It was competent, doubtless, for Judge Smith to forfeit said contract by reason of the breach of its covenants on the part of Mrs. Beebe, but it is not proved that it was ever forfeited, nor is there any evidence from which such a forfeiture can be inferred.

The offer of performance by plaintiff, imposed upon Boehme the duty of accepting it and conveying to plaintiff the interest in the premises to which he is entitled.

It is not necessary now to decide whether the offer was in strict compliance with the terms of the contract. That will be best understood when the evidence is all in. If there has not been a full performance by the plaintiff, he will be charged with the costs of the action, and he will be entitled to a deed only upon a full compliance with the contract, and upon securing Boehme from

liability upon the bond and mortgage given to Judge Smith to the extent of one-half thereof and interest thereon.

Judge Smith was not bound to accept any of the offers of the plaintiff, as he was under no obligation to subject the estate to liability to litigation with more than one grantee.

The judgment must be reversed and a new trial ordered, costs to abide event.

Ordered accordingly.

WILLIAM H. WOODHULL, SOLE TRUSTEE OF SCHOOL DISTRICT
No. 9, TOWN OF WEBSTER, APPELLANT, v. JACOB BOHEN-
BLOST, COLLECTOR OF SAID DISTRICT, RESPONDENT.*

*Collector of school taxes—bond given by—statute as to, mandatory—Trustees not
entitled to receive money—actions against collector.*

A collector of school moneys has no power to execute a warrant for the collection of a tax until the bond directed to be given by section 83, chapter 555 of 1864, is executed.

Until the trustees limit the time within which the bond must be given, and determine its amount, the collector will not be in default.

The trustees are not entitled to receive the money from the collector, who is only obliged to pay it out on their order, and he is not in default until such an order is drawn and presented to him.

An action lies against the collector, in favor of the trustee, on his bond: 1st. When he fails to execute his warrant. 2d. If, by his laches, any tax is lost to the district, or he has neglected to pay over any balance in his hands to his successor.

THIS action was brought to recover of the defendant, alleged to be collector of school district No. 9, of the town of Webster, the amount of a tax assessed in said district for school purposes, and for the collection of which a tax list and warrant were delivered to the defendant as collector of the district, and which had never been returned by him.

The defendant was duly elected collector on the 14th of October, 1873, and was notified of his appointment on the fifteenth of that month. On the 12th of November, 1873, a tax list and warrant

* Decided at the January term, 1875.

were made out and delivered to him. Up to that time he had not executed a bond for the faithful performance of his duties, nor had he been required to execute one. Some days after the warrant was left with him, the trustee left a bond to be executed, but it was never done.

A warrant and tax list had been delivered to defendant for the collection of the same tax, a few days before the one above mentioned. The trustee, learning that it was defective, as not being assessed upon the last preceding assessment roll of the town, took it back and issued a second one. The defendant collected the tax on one person on the first list, but did nothing under the second. The trustee drew no orders on the defendant, and no money has been paid to the trustee, nor has the warrant been returned.

The County Court of Monroe, in which the action was brought, nonsuited the plaintiff and denied a motion for a new trial. The plaintiff appeals to this court.

William E. Edmonds, for the appellant.

H. Sargent, for the respondent.

MULLIN, P. J. :

The grounds upon which the defendant's counsel moved to nonsuit the plaintiff were :

1. That the County Court had not original jurisdiction of the action, as it was not alleged in the complaint that the plaintiff was a resident of the county of Monroe.

2. The collector had not given a bond, and was not therefore collector.

3. No order has been drawn on the collector for the money, and until that is done it cannot be known that he has not performed his duty.

4. The plaintiff had no power to withdraw the first warrant, without the consent of the State superintendent, which has not been obtained.

5. The warrant could not be delivered to the collector until after thirty-one days from the day on which the tax was voted. The warrant in this case was issued in twenty-nine days after.

6. If the defendant was liable, the action should have been on

his official bond; and as he had given none, no action could have been maintained.

The court held that it was only necessary to allege in the complaint that the defendant was a resident of the county.

As to the second, it was proved that, in the bond left with the defendant for execution, the sum of \$150 was inserted.

By section 83 of the act relating to common schools, passed in 1864, it is provided that within such time, not less than ten days, as the trustee shall allow him for the purpose, the collector, before receiving the first warrant for the collection of the money, shall first execute a bond in such sum as the district meeting shall have fixed, or, if the meeting shall not have fixed a sum, then in such sum as the trustee shall fix.

It would seem to be a legitimate conclusion from the requirement of the statute, that, before receiving the first warrant for the collection of money, the collector is required to give a bond; that it was the intention of the legislature that the collector should have no power to execute a warrant for the collection of a tax until such bond is given.

Before a bond can be executed, the act contemplates that the trustee shall limit a time within which it must be executed, and fix the amount of its penalty. Until these things are done the collector is not in default, but the warrant shall not be given to him until he has given the necessary bond.

It seems to me that this provision of the statute is mandatory, and as no bond has ever been given, the collector has never had authority to collect the tax. Inserting the amount in the bond left with the defendant for execution, was such a designation of the amount of the penalty as satisfied the statute in that regard; but as no time has been limited for executing the bond, the collector might, for aught that appears, wait until the end of his term before giving his bond.

By section 88 the collector is required to keep in his own possession the moneys collected and received by him by virtue of any warrant, to be paid out by him upon the order of the trustee.

The trustees are not entitled to receive the money, and the collector is not in default for not paying, until the order is drawn and presented. No such order being drawn in this case, it is not estab-

lished that he has neglected or refused to pay over money collected by him. The remedies of a trustee against a collector are : First, an action on his bond, if he has not executed his warrant ; and, second, if, by his laches, any tax is lost to his district, or he neglects to pay over any balance in his hands to his successor, an action on his bond. And these seem to be the only actions that lie against the collector, and in favor of the trustees.

The first warrant could not be withdrawn and another substituted in its place, without the consent of the superintendent of public instruction. That not being obtained, the last warrant would not have protected the collector had he attempted to enforce it. (See § 87 of the act of 1864.)

I have now disposed of all the grounds of nonsuit that seem to require consideration, and my conclusion is that plaintiff was rightly nonsuited.

Judgment affirmed.

JOHN D. MOORE, APPELLANT, v. WILLIAM H. BRINK AND CHARLES F. KING, ADMINISTRATORS, ETC., RESPONDENTS.*

Joint stock companies — Copartnerships — Chap. 258 of 1849 — Chap. 153 of 1853 — liability of stockholders under — Representatives of deceased stockholder — when action can be maintained against.

In the absence of any legislation regulating the liability of members of voluntary joint stock companies or associations, they are to be treated as partnerships, and the members are individually liable for the debts of the association.

By the provisions of chapter 258 of the Laws of 1849, as amended by chapter 153 of the Laws of 1853, the right to sue the members or stockholders individually, after judgment and execution against the company, is reserved to its creditors. If one of the members die, the creditor must first pursue his remedy against the survivors.

APPEAL from a judgment in favor of defendants, entered upon the decision of the court on a trial without a jury.

W. B. Ruggles, for the appellant. On the death of John Brink, his stock in the Savona Union Store passed to his administrators,

* Decided at the January term, 1875.

the defendants, who thereby became, by operation of law, stockholders, subject to the burdens incident to its ownership. (*Bailey v. Hollister*, 26 N. Y., 112; *Matter of North Shore Staten Island Ferry Co.*, 63 Barb., 556; *Diven v. Duncan*, 41 id., 524; Rev. Stat., part 2, chap. 6, tit. 3, art. 1, § 6; 2 Edm., 84, 85; Laws of 1869, chap. 157.) The statute makes that liability a joint and several individual liability. After execution against the company, returned unsatisfied, "suits may be brought against any or all of the shareholders or associates individually." (Act of 1849, chap. 258, as amended by chap. 153, Laws of 1853; 4 Edm., 650.) The reason of the rule requiring partnership creditors to exhaust their remedy against the survivors before suing the personal representatives of a deceased partner, does not exist in joint stock companies. (Collyer on Part., § 129 [3d Am. ed.]; Story on Part., § 346, and note; *Case v. Abeel*, 1 Paige, 393; 17 N. Y., 354.)

Rumsey & Miller, for the respondents. No suit can be maintained upon a partnership liability against the legal representatives of a deceased partner until the surviving partners have first been sued and execution against them returned unsatisfied, or unless they are insolvent. (*Voorhees v. Child's Exrs.*, 17 N. Y., 354, 357; *Hoyt v. Bonnett*, 50 id., 538, 545.) The common-law rule was that unincorporated joint stock associations are partnerships. (Parsons on Part., 544; *Tappan v. Bailey*, 4 Metc., 529, 535; *Wells v. Gates*, 18 Barb., 554, 556; *Holmes v. Higgins*, 8 E. C. L., 28; *Bridenbecker v. Hoard*, 32 How. Pr., 289.) The shareholders must be sued jointly and survivors must be sued first. The provision that they shall be individually liable does not make them severally liable. (*Allen v. Sewall*, 2 Wend., 327, 338; *Moss v. Oakley*, 2 Hill, 269; *Bailey v. Bancker*, 3 id., 188, 190.) Nor are they made severally liable because the statute permits any or all to be sued. These words are qualified by the words, "as now provided by law," and they mean "some or an indefinite number." (*Witherhead v. Allen*, 28 Barb., 666.) The death of one joint obligor renders his survivors only primarily bound, and the executors cannot be proceeded against in the first instance. (*Fielden v. Lahens*, 6 Blatch., 524; *Richter v. Poppenhausen*, 42 N. Y., 373, 376.)

MULLIN, P. J.:

The Savona Union Store was a voluntary joint stock association, that carried on the mercantile business at Savona, in the county of Steuben, and was composed of more than seven members who were stockholders therein. On the 15th August, 1858, said company became indebted to Chester Whitaker, in the sum of \$644.17, on which certain payments were made. In 1866, the plaintiff, to whom the aforesaid indebtedness had been assigned, brought an action in this court to recover said indebtedness, and in July of that year recovered a judgment against said company for \$464.17 damages, besides costs. An execution was duly issued on this judgment and returned wholly unsatisfied. John Brink was a member of said company from August, 1858, until his death in July, 1872. The defendants were appointed administrators of his estate, and took upon themselves the duty of said office. The plaintiff, after the appointment of said administrators, brought this action against them to recover the said indebtedness, upon the ground that they had become owners of the stock held by their intestate at the time of his death, and were therefore liable as stockholders in said company. The learned judge who tried the cause, held that the action could not be maintained, until the plaintiff had exhausted his remedy against the surviving members of said company, and as that had not been done he dismissed the complaint.

The only question before us is, whether this ruling of the learned judge was right. In the absence of any legislation regulating the liability of members of these voluntary joint stock companies or associations, they are to be treated as partnerships, and the members individually liable for the debts of the association.

The legislature in 1849 passed an act (chap. 258 of the Laws of that year), providing that any joint stock company consisting of seven or more members, might sue and be sued in the name of the president or treasurer, and that suits so brought should have the same force and effect, as regarded the joint rights, property and effects of said company, as if prosecuted in the names of all the shareholders in the manner provided by law. It was further provided, that no suit so commenced should abate by reason of the death or resignation of the officer in whose name it was brought. It was further provided that the officer in whose name the action

was brought should not be personally liable upon the judgment recovered against him, nor should he be exempt from any liability he might be under as a member of said company. By the fourth section of said act, it was declared that nothing contained in it should be construed to deprive any plaintiff of the right, after judgment against the company, to sue all or any of the shareholders individually, as is provided by law, or of the right to proceed in the first instance against the persons composing such company, in the manner now provided by law. The fifth section provided that nothing in said act should be construed to confer on joint stock companies any of the rights or privileges of corporations, except as therein specially provided.

In 1853 another act was passed, amending the act last referred to (chap. 153 of the Laws of that year), and by the fourth section such former act was amended by providing that after judgment against the company and execution thereon is returned unsatisfied in whole or in part, suits may be brought against any or all of the shareholders individually, as now provided by law. The remaining provisions have no bearing on the question under consideration and therefore omitted.

In view of the provisions of the fourth section of the act of 1849, as it was passed, and as it is amended, it is manifest that whether joint stock companies are or are not corporations, the right to sue the members or stockholders individually, after judgment and execution against the company, is reserved to the creditor of the company, as that right existed at the time of the passage of the act of 1849. At that time, joint stock companies, unless exempt by some special law, were mere partnerships, and must have been proceeded against as such. And if one of the partners died, the creditor must proceed against the surviving members before an action could be maintained against the representatives of the deceased partner. (See cases collected in 4 Abb. Dig., 738, 739, §§ 397-405.)

The judgment is right, and should be affirmed.

Judgment affirmed.

HANNAH J. BELL, RESPONDENT, v. GEORGE WARN,
EXECUTOR, ETC., APPELLANT.

Legacy — gift over to second legatee — when valid.

Although a first legatee is authorized to consume the legacy if necessary for his subsistence, yet the right to make use of it for that purpose is rather in the nature of a power than an ownership, and a gift over of what the first legatee shall leave is good.

Where the gift to the first taker is absolute in its terms, or when the use only of the property is given, and the property is such that its use is its consumption, the gift will be deemed an absolute one, and a gift over would be void for repugnancy.

APPEAL from a judgment in favor of the plaintiff entered on the decision of the court in an action brought to obtain an adjudication upon a will.

The defendant's testator died possessed of real and personal estate, and leaving him surviving a widow and several children, among whom is a daughter, the plaintiff in this action, a *feme sole*, and also leaving a last will and testament, dated June 11, 1867, and a codicil thereto, dated June 1, 1868.

Said will and codicil were duly executed and published and duly proved before the surrogate of Cayuga county. The will contained the following bequest: "I hereby give and bequeath to my daughter Hannah J. Bell, \$1,250."

In the codicil was contained the following provision: "The sum of \$1,250 bequeathed to my daughter Hannah J. Bell by my said will, I attach the following conditions and directions: The said sum of money shall be invested on good security, and the interest semi-annually paid to her from my decease during her life, and if the said Hannah by reason of sickness or want, shall require for her support any of the said principal sum, I direct my executors to pay to her such portion or portions of the same, from time to time, as she may require or need, even to the whole amount of said principal sum; if at her death any of the said principal sum remains, I bequeath the same to her children, share and share alike."

H. V. Howland, for the appellant. The simple question is this: Where a testator by his will makes an absolute gift of property to

a legatee, and then by a subsequent codicil, or a residuary clause in the same will, qualifies and limits the gift, is the codicil or residuary clause void? (*Dorland v. Dorland*, 2 Barb., 63; *Wright v. Wright*, 13 Eng. L. and Eq., 165, 166.) But the codicil in this case, necessarily revokes and qualifies the entire donation. It changes an absolute title to a mere contingent life estate for support, and gives the remainder to her children equally. It takes away the absolute gift, and therefore does not attempt to limit a remainder upon an absolute title. (*Wright v. Wright*, 13 Eng. L. and Eq., 165.) But if any doubt ever existed upon this question before, it must be regarded as now settled in this State, that a testator may make an absolute gift of his property to a legatee in one clause of his will, and by a subsequent residuary clause, qualify and limit the gift to a mere life estate, giving the fee or remainder to others. (*Taggart et al. v. Murray et al.*, 53 N. Y., 233; *Chrystie v. Phyfe*, 19 id., 344; *Floyd v. Fitcher*, 38 Barb., 409.) But in the case at bar the gift itself is qualified and limited to a life estate only, and is not therefore an absolute title. (53 N. Y., 233.)

Wood & Rathbun, for the respondent. While a testator may make a bequest to one person in language denoting an absolute gift, and yet limit that bequest over to another on the happening of some event. (3 Kern., 273; 47 N. Y., 512.) The language of the will is a gift in the first part of \$1,250 to plaintiff, to do with as she please, and the provision in the codicil limiting the payment of it to her to such time or times as she is sick or in want, is a direction or restriction inconsistent with her doing with it as she pleases, and the fund not being limited over it is void. (3 Vesey, 324; 4 Sim., 141; approved 24 How., 51; 2 Barb., 534; 5 Sim., 232; 1 Jacob, 415.)

GILBERT, J.:

The judgment below seems to have proceeded upon the idea that the codicil did not qualify the gift to the plaintiff contained in the will. To this we cannot assent. The will and the codicil constitute but one instrument. So read, the intention of the testator, we think, is clearly manifested. It appears to have been his wish to give to the plaintiff only the income of the fund, and the right to consume so much of the principal as she should need for her suitable maintenance, and to give to her children whatever might remain

of the principal of the fund at her death. The codicil changed the gift from an absolute one to a qualified one of the nature stated. There is, therefore, no repugnancy between them. The limitation over is valid and effectual. The circumstance, that it may be defeated by the necessities of the plaintiff, does not affect it. It is expressly provided by statute, that an expectant estate in lands shall not be adjudged void because it may be defeated in that way. (1 R. S., 725, § 33.) And another statute expressly applies the same rule to bequests of personal property. (1 R. S., 773, § 2.) The intention of the testator must govern. (*Upswell v. Hall*, 1 P. Wms., 651; *Smith v. Bell*, 6 Pet., 68; *Norris v. Beyea*, 3 Kern., 273; *Trustees v. Kellogg*, 16 N. Y., 93; *Chrystie v. Phyfe*, 19 id., 351; *Taggart v. Murray*, 53 id., 233.) Such was the rule before the Revised Statutes. Although the daughter is authorized to consume the property bequeathed, and to that extent may be said to have the disposal of it, yet, being evidently given for her subsistence, the right to make use of the property for that purpose is in the nature of a power rather than an ownership, and a gift over of what the first legatee shall leave is good. Where the gift to the first taker is absolute in its terms, or where the use only of the property is given, and the property is such that its use is its consumption, the gift will be deemed an absolute one, and a gift over would be void for repugnancy. In all these cases the test is the intention of the testator. That will determine the character of the gift. (Wash. Real Prop., bk. 2, chap. 7, § 5, subs. 10, 11.) In *Norris v. Beyea* (*supra*), DENIO, J., states the principle applicable to cases of this kind. "There is," he says, "no repugnancy in a general bequest or devise to one person, in language which would ordinarily convey the whole estate, and a subsequent provision that upon a contingent event, the estate thus given should be diverted and go over to another person. The latter clause in such cases limits and controls the former." (P. 284; see, also, *Terry v. Wiggins*, 2 Lans., 272; S. C., 47 N. Y., 512.)

We have examined the cases cited by the respondent, but have not found anything in them in conflict with the views expressed.

The judgment must therefore be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

MEMORANDA
OF
CASES NOT REPORTED IN FULL.

JAMES H. MILLIMAN, RESPONDENT, *v.* THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY, APPELLANT.

Negligence.

This action was brought to recover for injuries sustained by the plaintiff in leaving the cars of the defendant. The plaintiff claimed that after the train had stopped and he had reached the door of the car and was about to leave the same, the train was backed by a sudden jerk and with great force, without warning to him, and that he was thereby thrown out and injured.

Upon the trial the court charged that if, after the train had been stopped to enable passengers to alight, it was suddenly and without warning moved and the plaintiff thrown out and injured, the defendant was liable; that it made no difference whether it was a motion backward or forward which occasioned the injury. *Held*, that the charge was correct.

APPEAL from an order denying a motion for a new trial.

E. G. Lapham, for the appellant.

J. H. Camp, for the respondent.

Opinion by SMITH, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Order affirmed.

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GEORGE W. LESLIE, RECEIVER, ETC., APPELLANT, v. WILLIAM S. RUGG, RESPONDENT.

Agreement to pay individual debts of partner with partnership assets—when fraudulent as against creditors.

An agreement entered into between partners that a portion of the partnership assets shall be applied to the payment of the individual debts of one partner, the firm being at the time insolvent, is fraudulent as against creditors of the firm and may be repudiated by a receiver thereof. (*Menagh v. Whitwell*, 52 N. Y., 146; *Ransom v. Vandewater*, 41 Barb., 307; *Wilson v. Robertson*, 21 N. Y., 587.)

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

C. W. Avery, for the appellant.

F. David, for the respondent.

Opinion by MULLIN, P. J.

Judgment reversed and new trial ordered, costs to abide the event.

JAMES MORRISON AND ANOTHER, APPELLANTS, v. ALEXANDER MORRISON AND ANOTHER, RESPONDENTS.

Mortgage—waiver of conditions of, for support and maintenance.

Where a mortgage is given conditioned for the support and maintenance of the mortgagee, and for the payment to him of a certain sum, weekly, a refusal on his part to receive such sum is a waiver of the condition, and the mortgagor is thereby discharged from performing the same. (*Young v. Hunter*, 6 N. Y., 204; *Holmes v. Holmes*, 9 id., 527; *Carman v. Pultz*, 21 id., 547.)

In an action brought to foreclose a mortgage conditioned for the support of the mortgagee, no relief can be granted for a neglect to support after the commencement of the action. (*Ferguson v. Ferguson*, 2 N. Y., 360.)

APPEAL from a judgment entered upon the report of a referee.

John Van Voorhis, for the appellants.

P. M. Crandall, for the respondents.

Opinion by MULLIN, P. J.

Judgment reversed and new trial granted, costs to abide the event.

CHAUNCEY D. SMITH, APPELLANT, v. JOHN L. WILCOX,
RESPONDENT.

Trover — Measure of damages.

This action was in trover, the defendant being charged with wrongfully taking and detaining the plaintiff's cow. The plaintiff claimed that the cow was dried up through the fault of the defendant while in his possession. Upon the trial a farmer, acquainted with the cow, was asked: "How much less is she worth, being dried up, than she would be if giving milk?" *Held*, that the question was proper.

APPEAL from a judgment of the County Court of Onondaga county, reversing a judgment of a Justice's Court in favor of the plaintiff.

S. N. Holmes, for the appellant.

E. S. Butterfield, for the respondent.

Opinion by MORGAN, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment of County Court reversed, and that of Justice affirmed.

JOHN W. SHUMWAY AND ANOTHER, EXECUTORS, ETC., OF
ISAAC SHUMWAY, DECEASED, RESPONDENTS, v. HARVEY
L. HARMON AND OTHERS, APPELLANTS.

Will — when real estate regarded as personalty — when executor entitled to rents.

Plaintiffs' testator, by his will, directed that his son should work his farm on shares for one and a half years after his decease, at the expiration of which time his said farm and personal property should be sold by his executors, and the proceeds divided among his children. *Held* (1), that upon the expiration of the year and a half it was the duty of the executors to sell the real and personal

estate of the testator, and convert the same into money; (2), that as equity regarded that as done which ought to have been done, the said real and personal estate must be regarded as converted into money, and to have become personal estate in their hands at the expiration of that time, and that thereafter the rents and profits of the said farm became part of the trust fund to be distributed by the executors, and that they were entitled to recover the same. *Moncrief v. Ross* (50 N. Y., 481) followed.

APPEAL from a judgment in favor of the plaintiffs, entered upon the report of a referee.

H. L. Comstock, for the appellants.

E. G. Lapham, for the respondents.

Opinion by SMITH, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment affirmed.

RANSOM P. ALGER, RESPONDENT, v. WILLARD JOHNSON,
APPELLANT.

Statute of frauds—when must be pleaded.

It is only when a complaint sets forth a contract, and the answer admits that allegation, that the defendant must plead the statute of frauds. (*Moak's Van S. Pl.*, 505, 555; *Duffy v. O'Donovan*, 46 N. Y., 226.)

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was brought for work done and materials furnished by the plaintiff to the defendant. The answer contained a general denial of all the material allegations of the complaint. The defendant claimed that the contract for the work and materials was with one Baker, and that therefore the promise of the defendant to pay therefor was within the statute of frauds, but the court was of opinion that the evidence showed that the employment was by the defendant and not by Baker, and affirmed the judgment.

FOURTH DEPARTMENT, APRIL TERM, 1875.

Stephens & Pardee, for the appellant.

H. C. Howe, for the respondent

Opinion by GILBERT, J.

Judgment affirmed.

CORNELIA VAN ALLEN, PLAINTIFF, v. THE FARMERS'
JOINT STOCK INSURANCE COMPANY, DEFENDANT.

Insurance company—general agent—powers of—Parol waiver of conditions, when policy in terms provides for written waiver only.

A general agent of an insurance company may waive the performance of a condition inserted in the policy for the benefit of the company. (*Ames v. N. Y. Union Ins. Co.*, 4 Ker., 253; *Liddle v. Market Ins. Co.*, 29 N. Y., 184; *Benedict v. Ocean Ins. Co.*, 81 N. Y., 889; *Boehen v. Williamsburgh Ins. Co.*, 35 id., 181; *Bodine v. Exchange Ins. Co.*, 51 id., 117.)

A parol waiver of a condition in a policy is good, notwithstanding a provision in the policy that nothing but a written agreement, signed by an officer of the company, shall have that effect. (*Parker v. Arctic Ins. Co.*, 1 N. Y. S. C., 397; affirmed by Court of Appeals.)

MOTION to set aside verdict for plaintiff and for a new trial, upon exceptions ordered to be heard in the first instance at the General Term. The action was upon a policy of insurance against fire.

M. Hopkins, for the plaintiff.

D. Pratt, for the defendant.

Opinion by GILBERT, J.

Judgment affirmed.

ANDREW J. BELKNAP, RESPONDENT, v. WENDELL M.
BENDER, APPELLANT.

Statute of frauds — promise to pay debt of another.

A being indebted to B for sawing lumber at A's mill, conveyed his property to C, who hired B to continue the running of the mill, saying that he would pay him the same that A had paid him, and saying further, that he had made arrangements with A to pay A's debt to the plaintiff, and that he would pay him the back pay that was coming to him. *Held*, that the agreement to pay A's debt was void under the statute of frauds. (*Pfeiffer v. Adler*, 37 N. Y., 164; *Mallory v. Gillet*, 21 id., 412.)

THIS is an appeal from a judgment entered upon the verdict of a jury, rendered at the Lewis Circuit in June, 1874.

C. D. Adams, for the appellant.

J. Thomas Spriggs, for the respondent.

Opinion by MORGAN, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment reversed and new trial granted, costs to abide event.

FANNY J. WHELOCK, APPELLANT, v. GEORGE M.
CUYLER, RESPONDENT.

Evidence — Code, section 399.

Where in an action of trespass, *quare clausum fregit*, defendant claims to have entered as the agent of the owners, the testimony of plaintiff's grantors as to conversations between them and a person deceased at the time of the trial, through whom defendant's principal claims, is inadmissible under section 399 of the Code.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

Scott Lord, for the appellant.

James Wood, for the respondent.

Opinion by MORGAN, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment affirmed.

EVANDER S. VAN LIEW AND ANOTHER, ADMINISTRATORS,
APPELLANTS, v. STEPHEN V. R. JOHNSON AND OTHERS,
IMPLEADED, RESPONDENTS.

Fraudulent contract — remedy of party defrauded.

The remedy of a party defrauded is either to affirm the contract and sue for the damages occasioned by the fraud, or to disaffirm the contract and to sue for the recovery of whatever has been received under the contract by the other party.

He can pursue the latter remedy only on condition that he has restored, or offered to restore, all that he has himself received under the contract.

APPEAL from an order sustaining a demurrer to the complaint in this action.

McDonald & Rose, for the appellants.

Thaddeus Bodine, for the respondents.

Opinion by GILBERT, J.

Order appealed from affirmed with costs, with leave to the plaintiff to amend in twenty days on payment of costs.

DANIEL AVERY, ADMINISTRATOR, ETC., APPELLANT, v.
MALACHI FOLEY, RESPONDENT.

Referee.

No exception lies to the refusal of a referee to find the particulars which go to make up his general conclusions of fact.

It is erroneous for a referee to find the evidence of facts instead of the facts themselves. (*Beck v. Sheldon*, 48 N. Y., 369.)

FOURTH DEPARTMENT, APRIL TERM, 1875.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

H. A. Maynard, for the appellant.

James Lyon, for the respondent.

Opinion by GILBERT, J.

Judgment reversed and new trial granted before another referee, costs to abide event.

ELON G. CARPENTER, APPELLANT, v. THOMAS GREEN
AND JAMES GREEN, RESPONDENTS.

Summary proceedings—when appeal does not lie from judgment in.

APPEAL was brought from a judgment of the County Court of Ontario county, reversing the judgment of a justice of the peace, rendered upon the verdict of a jury, in summary proceedings instituted by the plaintiff as landlord to remove the defendants as tenants.

The court was of opinion that no appeal to this court in cases like this has been given. It is a special proceeding, and the Code relates only to appeals in civil actions. The act of 1854, in relation to special proceedings (chap. 270), is confined to appeals from an order or final determination, made at a Special Term of the same court, and does not authorize an appeal from such order or determination of a County Court. That as the act of 1849, to amend the Revised Statutes in relation to summary proceedings to recover the possession of land, expressly provides that the decision of the county judge shall be final, the court had no alternative but to dismiss the appeal. (Laws 1849, chap. 193, § 5, sub. 2; *Douel v. Rust*, 24 Barb., 438, 446.)

Spencer Gooding, for the appellant.

Henry Brush, for the respondents.

Opinion by GILBERT, J.

Appeal dismissed without costs.

THE SENECA NATION OF INDIANS, RESPONDENT, v.
GEORGE HAMMOND, APPELLANT.

Indian reservation—cutting and removing timber from—when illegal.

AN appeal from the decision of the Special Term in Cattaraugus county, sustaining the plaintiff's demurrer to the defendant's second answer.

The complaint alleged as a cause of action, the unlawful purchase, taking and carrying from the Cattaraugus Reservation, of a quantity of cord wood, contrary to the act of November 15, 1847, for the protection, etc., of the Seneca Indians; and demanded judgment for double the value of the property, etc.

The defendant's second answer alleged: That in June, 1873, certain Indians, members of the Seneca Nation and Tribe, were residing upon said reservation, and in the occupation and possession of certain lands thereon, which they had inclosed by good substantial fences, and which lands they had respectively occupied and improved and inclosed for many years. That said Indians, each for his own use and benefit, sold and transferred to defendant trees and timber, then being and growing upon their lands, so occupied and fenced, for which defendant paid to each Indian the full value in money; and afterward cut and carried away therefrom, said cord wood, etc.

To this answer the plaintiff demurred, on the ground that it did not state facts constituting a defense.

The General Term was of opinion that under the laws of the State relative to this reservation (chap. 365 of 1847, § 20; chap. 294 of 1859; chap. 455 of 1873), the acts of the defendant, in cutting and removing the timber from the reservation, were illegal, and affirmed the order.

J. M. Humphrey, for the appellant.

James G. Johnson, for the respondent.

Opinion by GILBERT, J.

Order affirmed.

JAMES M. SMITH, RESPONDENT, v. EDWARD E. HAZARD
AND OTHERS, APPELLANTS.*Evidence—Code, § 399.*

APPEAL from a judgment in favor of the plaintiff, entered at Special Term.

This action was brought to foreclose a mortgage made by the defendant Edward E. Hazard and his wife, to Morris Hazard, dated January 27, 1869, to secure the payment of \$20,000, with interest. Morris Hazard died in 1870, having made his will devising all his estate, including said mortgage, to Maria B. Hazard, whom he appointed sole executrix thereof. Subsequently Maria B. Hazard assigned the mortgage to the plaintiff as collateral security for the payment of \$69,500. Maria B. Hazard afterward died, leaving a will, and Robert R. Hefford and Robert P. Wilson were appointed executors thereof. This action was brought by Hefford and Wilson, as such executors, and said James M. Smith as plaintiffs. Edward E. Hazard and Margaret D. Hazard answered separately, but their interests were identical.

The principal point raised by the exceptions, was as to the exclusion of the testimony offered by Edward E. Hazard, of transactions between him and Morris Hazard, deceased, tending to contradict the mortgage.

The testimony offered was rejected, under section 399 of the Code.

The General Term was of opinion that the evidence was properly excluded. (*Mattoon v. Young*, 45 N. Y., 697.)

Sprague & Gorham, for the appellants.

Spencer & Clinton, for the respondent.

Opinion by GILBERT, J.

Judgment affirmed, with costs.

THE EVANGELICAL LUTHERAN ST. JOHN ORPHANS'
HOME OF THE CITY OF BUFFALO, RESPONDENT, v. THE
BUFFALO HYDRAULIC ASSOCIATION, JACOB GETZ
AND FRANKLIN GETZ, APPELLANTS.

Easement—when may be sold under execution.

APPEAL from a judgment in favor of plaintiff, entered upon the report of a referee.

The action was brought to obtain a perpetual injunction, restraining the defendants from completing a dam across the Buffalo river, at or near the junction of the Cayuga creek with the middle branch of the Buffalo creek, and to remove so much of such dam as they had constructed.

The property or easement which was the subject of this controversy, was sold under execution issued on a judgment recovered against the defendant corporation. The referee found that the easement was abandoned. That Robert Troup and others were, on and before February 21st, 1828, seized of the lands where the subject of this controversy is located, and on that day they, by an instrument in writing, gave and granted to said corporation and its successors, among other things, the right and privilege to enter upon and take possession of such piece of land as should be necessary for a dam or dyke, said right to become forfeited in case of any breach or failure to perform the conditions of said instrument. That on the 1st of October, 1852, Ruben B. Heacock recovered a judgment against The Buffalo Hydraulic Association for over \$50,000, and upon an execution issued upon that judgment, said right and privilege were sold. That the sale under the execution, and the deed executed and delivered in pursuance thereof, divested the said The Buffalo Hydraulic Association of all rights, title and interests which it then had in said dam, and all the easements and rights of property conferred upon or conveyed to it by said Robert Troup and others. The defendant corporation claimed that the easement became blended with the franchises conferred upon it by the legislature, was a part of them, and could not be sold.

The General Term *held*, that the property, and, as appurtenant to it, this easement, was liable to sale under execution (Ang. on W. C., 8, § 142, 143, 153 *a*; *Goodrich v. Burbank*, 12 Allen, 461; *Post v. Pearsall*, 22 Wend., 425); that, as the right to terminate the servitude was expressly reserved to the grantor in the deed conveying it to the said defendant, no question was presented as to the power to abandon an easement acquired by grant.

Thayer & Benedict, for the appellants.

Geo. W. Cothran, for the respondent.

Opinion by GILBERT, J.

Judgment affirmed, with costs.

THE MERCHANTS' BANK OF CANADA, RESPONDENT, v.
NELSON HOLLAND, IMPLEADED WITH DILLON BEEBE,
APPELLANT.

Partnership—authority to act in name of firm obtained by fraud—fraud no defense.

APPEAL from a judgment entered upon the report of a referee in favor of the plaintiff.

A was engaged in business with B and C as copartners under the name of A & Co. Unknown to B and C, A entered into and carried on another independent business under the name of A & Co. Afterward, on the discovery of this fact, an agreement was entered into between A and B providing for a dissolution of the partnership existing between them, in which settlement the independent business carried on by A was included, but was so included by reason of false statements made by A to B in relation thereto. It was provided in the settlement that each party was authorized to use the name of the firm in liquidation, and in making such commercial paper as might be necessary to renew such as already existed or to complete the contracts already made, but no renewals to be made except by the consent of both parties in writing. After the settlement was made, A continued the independent business,

and the drafts, to recover upon the acceptances of which this action was brought, were drawn upon A & Co., and accepted or indorsed by A in the name of A & Co., but related to such separate, independent business. The plaintiff had been falsely informed by A, prior to the settlement, that B was one of the firm carrying on the independent business, but said plaintiff never saw, knew or had any notice of the settlement or the provisions thereof. It was *held*, that B was liable; and that, as after the settlement A had authority by its terms to bind him, it was of no consequence whether the plaintiff knew of such authority or not; that the fraud of A, by which the settlement was obtained, could not be set up by B as against the plaintiff.

Wm. H. Greene, for the appellant.

E. C. Sprague, for the respondent.

Opinion by MORGAN, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment affirmed.

THE AGRICULTURAL NATIONAL BANK OF PITTS-
FIELD, RESPONDENT, v. HIRAM G. SHEFFIELD AND OTHERS,
APPELLANTS.

Promissory note — when usurious — lex loci contracti.

The plaintiff, a Massachusetts corporation, agreed to take notes in payment of a judgment, a lien on real estate owned by some of the defendants, under an arrangement which, by the laws of this State, would be usurious, though not so under the laws of Massachusetts. All the defendants resided in the State of New York, and the transactions took place in this State, but the notes were dated at Pittsfield, Massachusetts, and made payable there, with the intention, as was claimed by defendants' counsel, to evade the usury law of this State. The only evidence of such intention was, that one of the defendants offered to draw the note himself; that the attorney of the bank, in the presence of one of the

directors, said "No, we will make the notes ourselves; we have blanks here in my office [at Canandaigua, N. Y.], and I will make out the notes," and he drew the note in question; that there was no agreement or understanding at the time that any of the debt was to be paid in Massachusetts, or that the notes would be paid there. The court at Special Term gave judgment for the plaintiff. The General Term affirmed the judgment, holding that the contract was a Massachusetts contract (*Curtis v. Leavitt*, 15 N. Y., 88; *Cutler v. Wright*, 22 id., 472), and that the facts stated were not sufficient to show an intention to evade the statute of this State against usury.

Wm. H. Smith, for the appellants.

John Gillette, Jr., for the respondent.

Opinion by MORGAN, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment affirmed.

PETER WILSON, PLAINTIFF, v. JAMES VAN PELT,
DEFENDANT.

Contract reserving growing crops—liability for use of lands—right of ingress and egress.

EXCEPTIONS ordered to be heard in the first instance at General Term, on the coming-in of a verdict in favor of plaintiff.

Articles of agreement were made between A. of the first part and B. of the second part. The said party of the first part, in consideration of the sum of \$125 per acre, agreed to sell to the party of the second part, his farm in the town of Brutus, "excepting and reserving the wooden part of the house, up stairs and down stairs, and the south half of the garden next north of the house, until the 1st of October, 1870. Said A. also reserves, for his own use, all the wheat and rye now growing on said premises, together with sufficient room in the barn to put said wheat and rye into, and thresh the same." A. agreed to allow B., on October 1, 1870, \$100 "for the use of the premises above reserved by him, and which

said sum of \$100 is to be then applied upon the purchase-money of said premises. * * * In case A shall give to B full possession of said premises, and shall remove therefrom within three weeks, then the above provision in reference to the rent of said premises shall be inoperative, and the said Van Pelt shall pay to said Wilson the sum of \$2,100 instead of the sum of \$2,000, on the first day of October, 1870."

A, having given up the possession within three weeks, and the defendant (B) having harvested and removed the crops, *held*, in an action by A for conversion, that the court erred in charging the jury that the plaintiff was not entitled to recover, as the clause of the contract relating to the giving up possession within three weeks did not affect A's title to the crops, but only to the wooden part of the house. The court further *held*, that when growing crops are reserved as such, the party reserving them is not, in the absence of an agreement to pay, liable for the use of the land on which they grow, and has the right of ingress and egress for the purpose of harvesting and removing them. (*Whipple v. Foot*, 2 Johns., 418; *Stewart v. Doughty*, 9 id., 108; *Shepard v. Philbeck*, 4 Den., 174.)

William Porter, for the plaintiff.

W. E. Hughitt, for the defendant.

Opinion by MULLIN, P. J.

New trial ordered, costs to abide event.

NEHEMIAH RAPLEE, APPELLANT, v. STEPHEN T. ARNOT,
RESPONDENT.

APPEAL from a judgment in favor of the defendant, entered on the decision of a judge, at the Yates county Special Term.

The court, after consideration of the evidence in the case, concluded that the pleadings precluded a consideration of the case as it was really presented by the evidence, and that the General Term was not at liberty on this appeal to make so radical a change in the nature of the action as would justify a reversal of the judgment.

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J. McGuire and *William Rumsey*, for the appellant.

George B. Bradley, for the respondent.

Opinion by GILBERT, J.

Judgment affirmed, without prejudice to any other action or proceeding.

GEORGE W. LESLIE, RECEIVER, ETC., APPELLANT, v.
EPHRAIM DINGMAN, RESPONDENT.

APPEAL from a judgment of the County Court of Oswego, in favor of the defendant, and from an order denying a motion for a new trial made upon the judge's minutes.

A question of fact alone was presented by this appeal, which, the General Term *held*, had been properly submitted to the jury.

C. W. Avery, for the appellant.

F. David, for the respondent.

Opinion by MORGAN, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment and order affirmed.

JAMES MORRISON, ADMINISTRATOR, ETC., RESPONDENT, v.
THE NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial made on a case and exceptions.

The action was brought to recover for an alleged negligent killing of the plaintiff's intestate while crossing the track of the defendant. The principal question was whether or not the deceased had been guilty of contributory negligence. The General Term *held*, that

the finding of the jury was conclusive upon this point, and affirmed the judgment.

A. P. Laning, for the appellant.

E. C. Sprague, for the respondent.

Opinion by MULLIN, P. J.

Judgment and order affirmed.

PHILENA B. FISHER, AS ADMINISTRATRIX, ETC., OF JOHN FISHER, DECEASED, PHILENA B. FISHER AND CAROLINE C. FRARY, RESPONDENTS, v. STANLEY A. BANTA, IMPLEADED, ETC., APPELLANT.

APPEAL by the defendant from a judgment at Special Term. The action was brought to obtain a judicial construction of the wills of Albert Banta and of Charles Edward Banta.

The court was of opinion that all the material questions in the case had been disposed of on former appeals. (See 1 N. Y. S. O. [T. & C.], 97; and 1 Hun, 610.)

Morse & Wells, for the appellant.

W. W. Rowley, for the respondent Fisher.

De L. Crittenden, for the respondent Frary.

Opinion by GILBERT, J.

Judgment affirmed, with costs to be paid by the appellant.

CAROLINE E. EARLL, RESPONDENT, v. MINERVA M. PROUTY, IMPLEADED WITH SAMUEL POTTER, APPELLANT.

APPEAL from a judgment, entered upon the report of a referee. The action was brought to recover damages occasioned by careless and immoderate driving by the servants of the defendant Minerva Prouty, while in her employ.

The appellant claimed that no negligence had been proved against her, and also that the negligence of the plaintiff's husband contributed to produce the injury complained of. The General Term refused to reverse the judgment, the evidence being conflicting.

F. David, for the appellant.

Pratt, Mitchell & Brown, for the respondent.

Opinion by MORGAN, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment affirmed.

JOHN M. EASTERLY, PLAINTIFF, v. WILLIAM C. BARBER,
DEFENDANT.

MOTION for new trial by both parties, on exceptions ordered to be heard at the General Term in the first instance. The case on a former appeal will be found reported in 3 New York Supreme Court Reports, 421. The only question arising upon the new trial, not already passed upon by the General Term on the former appeal, was as to the effect of a note's being renewed to replace paper on which all the parties to the new note were liable upon an agreement made when the original paper was made, that the several parties were to be liable, as between themselves, as co-sureties. The judge refused to charge that the giving of the new note did away with the agreement made as to the obligations of the parties on the original note, and the General Term sustained the ruling, holding that in the absence of any new arrangement, the inference would be that the renewed paper was indorsed upon the basis of the original arrangement.

E. H. Avery, for the plaintiff.

Francis Kernan, for the defendant.

Opinion by MORGAN, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Motion for new trial denied.

JAMES WOLSTENHOLME AND OTHERS v. THE WOLSTENHOLME FILE MANUFACTURING COMPANY.

Cross appeals from a judgment entered upon the report of a referee.

The judgment was \$3,085.84, damages and costs in favor of the plaintiffs.

The defendant appealed from the judgment, upon the ground that the plaintiffs were not entitled to recover any judgment, and the plaintiffs appealed upon the ground that they were entitled to recover a greater amount of damages.

All the questions of law in this case were decided on a former appeal, the decision in which is reported in 3 Lansing, 464.

Benj. H. Austin, for the plaintiff.

E. C. Sprague, for the defendant.

Opinion by MORGAN, J.

MULLIN, P. J., concurred. SMITH, J., did not sit.

Judgment affirmed.

ANN H. PRESTON, RESPONDENT, v. ELMORE P. RUSS, IMPEADED, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The General Term *held*, that the findings of the referee were supported by the evidence, and affirmed the judgment.

D. Pratt, for the appellant.

Edwin Allen, for the respondent.

Opinion by SMITH, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment affirmed

JOHN S. LYON, APPELLANT, v. LOREN WILCOX AND ANOTHER,
ADMINISTRATORS, ETC., RESPONDENTS.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

In this action, brought to recover the value of work, labor and services, performed for the defendant's intestate, the referee found that the plaintiff had been paid in full therefor. The General Term *held*, that this finding was not sustained by the evidence, and reversed the judgment.

J. W. Dininny, for the appellant.

George B. Bradley, for the respondents.

Opinion by SMITH, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment reversed and new trial granted, costs to abide the event.

JOHN OUSBY, RESPONDENT, v. EDMUND G. JONES,
APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered on a verdict directed by the court.

The General Term *held*, that, upon the evidence in the case, the court erred in directing a verdict, and ordered a new trial.

W. P. Goodelle, for the appellant.

F. Hiscock, for the respondent.

Opinion by SMITH, J.

Present — MULLIN, P. J., SMITH and MORGAN, JJ.

Judgment reversed and new trial granted, costs to abide the event.

Cases

DETERMINED IN THE

FIRST DEPARTMENT

AT

GENERAL TERM,

May, 1875.

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THE TENTH NATIONAL BANK, PLAINTIFF, v. THE
MAYOR, ETC., OF THE CITY OF NEW YORK,
DEFENDANT.

Action for interest cannot be maintained after acceptance of principal—Commissioners of Charities and Corrections—power of, to borrow money—chap. 9, 1872.

A creditor who has received the principal debt as such in full, cannot thereafter maintain an action for interest.

The commissioners of charities and corrections have no lawful authority to borrow money and thus create a debt against the city of New York.

Provisions of chapter 9 of 1872, section 2, construed.

MOTION for a new trial on exceptions ordered to be heard at General Term in the first instance.

The plaintiff alleges in the complaint that the defendant, on the 1st October, 1871, was indebted to it for advances of money theretofore made to the defendant by and through the department of public charities and corrections to the amount of \$277,930.05, for which sum, with interest from October, 1871, it demands judgment.

The answer alleges payment of the debt set forth in the complaint, on the 8th October, 1872.

The proof showed that payment of the amount as alleged in the answer, was made in pursuance of a settlement of the claim agreed upon between the parties, and the court thereupon directed a verdict for the defendant.

Henry H. Anderson, for the plaintiff.

D. J. Dean, for the defendant.

DAVIS, P. J. :

The court on the trial directed a verdict for the defendant. We think the direction was right for several reasons. The loan made by plaintiff to the commissioners of charities and corrections in the form of overdrafts, amounted to the sum of \$277,930.05 exclusive of any claim for interest. It was distinctly proposed by the defendant to pay that sum *as principal*, in full of the claims, and it was made a condition of the payment that the claim for interest should be waived. On this point there was no substantial conflict between the testimony of Mr. Strahan, who acted on the part of the defendant, and Mr. Palmer, who acted for the plaintiff; and the papers executed on the settlement showed that the payment of the principal was in full. This brings the case, we think, clearly within the decisions which hold, in substance, that where a creditor has received the *principal debt as such* in full, he can thereafter maintain no action for interest. There was no express contract in this case on the part of the city to pay interest. It was recoverable, if at all, only as damages upon some usage to be shown, from which a contract might be implied; and in such cases the acceptance of the principal in full, especially if accompanied by a waiver of interest as a condition of the payment of the principal, must be held to terminate all right of action for the debt or any of its incidents.* Again, the commissioners of charities and corrections had no lawful authority to borrow money, and thus create a debt against the city. The corporation was not liable to an action to recover the money because the debt was created

* *Jacot v. Emmett*, 11 Paige, 142; *Gillespie v. Mayor, etc.*, 3 Edw. Ch., 512; *Tillotson v. Preston*, 3 Johns., 229; *Fake v. Eddy's Executor*, 15 Wend., 76; *Consequa v. Fanning*, 3 Johns. Ch., 587; *Johnston v. Brannan*, 5 Johns., 268

without authority and by an excess of power on the part of one of its departments. * The plaintiff was bound to take notice of this want of power and the limitations it imposed. † The act of 1872, ‡ which provided that "the comptroller shall be authorized and required to pay back * * * to the various banks, all moneys which have been advanced by said banks, or any of them, prior to December 31, 1871, to or for the use of any of the departments or commissioners of the city and county of New York," is not to be enlarged to cover more than is expressly provided for in the act. The duty is imposed upon the comptroller and not upon the city. He is authorized and required to pay "the moneys which have been advanced," and no provision is made for the payment of interest. Inasmuch as there was no existing legal obligation on the part of the city to pay the indebtedness at all, it will not be implied that the legislature intended to require the comptroller to pay interest on such moneys as well as the principal. Under such circumstances the expression of one should be construed to be the exclusion of the other. But, however this may be, it seems clear that it was in the power of the parties to solve the doubt or controversy that might arise as to the requirement to pay interest, by agreeing that the payment of the moneys actually advanced should be in full of all claims. There is no need to consider the constitutional question raised by the defendant's counsel. We think the motion for a new trial should be denied, and that the defendant should have judgment on the verdict, with costs.

DANIELS and BRADY, JJ., concurred.

Judgment affirmed.

* Laws of 1870, chap. 137, §§ 22, 101; Laws of 1860, chap. 510; Laws 1871 § 15, chap. 574.

† Dillon on Municipal Corp., §§ 380, 419; Hodges v. Buffalo, 2 Denio, 110; Donovan v. The Mayor, 33 N. Y., 291.

‡ Laws of 1872, chap. 9, § 2.

THE MARYLAND COAL COMPANY, APPELLANT, v.
HENRY EDWARDS, RESPONDENT.

Sale of property—credit given to agent—when principal discharged by.

Where property is sold to an agent who, at the time, discloses the name of his principal, and states that the goods may be charged to him or to his principal, and the vendor, not knowing the principal, charges the goods to the agent, it is a question for the jury whether or not such exclusive credit is given to the agent as to discharge the principal.

APPEAL from a judgment in favor of the defendant, entered upon an order of the court at Circuit dismissing the complaint.

Elliott F. Shepard, for the appellant. Buying in their own name did not discharge their principal, but only added the personal obligation of the agents. (Pothier *Traité des Oblig.*, No. 82; *Hopkins v. Laconture*, 4 La., 64; *Thomson v. Davenport*, 9 Barn. & Cress., 78; 1 Bell's Comm. Mer. Jur., § 418; *Wyatt v. Marquis of Hertford*, 3 East, 147; *Taintor v. Penulergast*, 3 Hill, 72.) Plaintiff had made no election to credit the agents, and not the principal. (Story's Agency, §§ 288, 289; *McGraw v. Godfrey* [Gen. Term Com. Pleas], 14 Abb. [N. S.], 397; *Curtis v. Williamson*, L. R. [10 Q. B.], 57; *Rathbone v. Tucker*, 15 Wend., 498; affirmed, 18 id., 175; *Muldon v. Whitlock*, 1 Cow., 290; *Porter v. Talcott*, id., 359.)

A. Prentice, for the respondent.

DAVIS, P. J.:

This action was brought to recover the price of 100 tons of coal, alleged to have been sold by the plaintiff to the defendant. The defendant resided at Canajoharie. His sons were in business in New York, as produce dealers, under the firm name of J. H. & J. T. Edwards. Under date of September 28, 1871, the defendant wrote to his sons as follows:

"DEAR SONS.—I hear this morning that the boat Andrew Farrell went by here yesterday for Buffalo, and did not bring the Cumberland coal; therefore, you will have to get another boat and send

100 gross tons of Cumberland coal; I must have the coal, certain. Don't fail to attend to it; and also throw in for 300 tons stove coal for next month. Get best kind of coal for me, well screened.

"Yours, etc.,

"HENRY EDWARDS."

J. H. & J. T. Edwards were not dealers in coal. This letter must, therefore, have been understood by them as an order to purchase the coal and procure a boat by which to ship it to defendant at Canajoharie, and for those purposes they were doubtless agents for the defendant. In October following, J. H. Edwards went to the salesman of the plaintiff in New York, and purchased the coal. He told the salesman he bought it for his father, "a party up the river," and gave him "the privilege to charge it to whichever party he saw fit." The salesman says that not knowing his father, he took a reference as to the firm of J. H. & J. T. Edwards, which proving satisfactory, he charged the coal to them. A bill of the coal was made out to J. H. & J. T. Edwards for the amount, and an order for the delivery of the coal was given. The terms of the sale were cash in thirty days.

J. H. & J. T. Edwards procured a boat to which the coal was delivered at Hoboken. It was carried thence to Canajoharie and delivered to defendant, who was a merchant and dealer in coal at that place. The salesman further testified that he sold the coal to J. H. & J. T. Edwards, and gave the credit to them; that he made the entry charging the coal to them, as a matter of convenience, because J. H. Edwards allowed him to charge it to either party, and they were in the city; that he "looked to them to be responsible, for he looked to them for pay." Evidence was also given, showing the delivery of the coal to the defendant, who paid the freight, and that afterward the defendant said that he did not know whom he would have to pay for it; that he had given the money to his sons to pay for it, and it appeared that they failed and did not pay for it, and they were trying to get it out of him again.

Other evidence was given, tending to show that the sale was made and the credit given to J. H. & J. T. Edwards. On the close of the plaintiff's evidence, the defendant's counsel moved for a dismissal of the complaint, on the ground that there was no

evidence showing that the defendant ever purchased any coal of plaintiff. The court granted the motion, and plaintiff duly excepted.

The evidence in the case certainly tended to show that J. H. & J. T. Edwards were authorized to purchase the coal for defendant as his agents, and that they so far disclosed the agency to plaintiff as to say that the coal was bought for their father, a party up the river, and that it might be charged to him or to them, at the election of plaintiff. It is quite clear also, that the coal was charged to them, and the credit given to them; but the witness qualifies this by stating also, that this was done as matter of convenience, the firm residing in the city. The fact of the agency was thus disclosed, and the principal was indicated, and the option given to make the charge to either.

The true question in the case was, as it seems to us, whether, under the circumstances, the credit for the coal was given exclusively to the agents. This was a question of fact for the jury to determine under proper instructions from the court, and notwithstanding the evidence tended to show quite strongly that the credit was so given, it seems under all the circumstances to have been a proper case for the consideration of the jury. "Where the principal is disclosed at the time of the purchase, it then becomes a question of fact to be determined from all the circumstances of the case, whether the vendor relied exclusively upon the credit of the agent or not. If he did, he cannot afterward resort to the principal." *

In the case in 10 Wendell, † the word "agent" was used in the bill of goods, and in the draft given on their purchase by the agent. This was all the disclosure made of the principal. The court held that it was a question for the jury to decide, whether the goods were sold exclusively upon the credit of the agent and of the bill or not.

In *Rathbone v. Tucker*, ‡ the agent gave his own note for the pur-

* *Beebe v. Robert*, 12 Wend., 413, per SUTHERLAND, J., page 417; 15 East, 62; 4 Taunt., 574; *Pentz v. Stanton*, 10 Wend., 271, 278; *Bently v. Griffin*, 5 Taunt., 356; 1 Com. L. R., 181; *Legget v. Reed*, 1 Carr. & Payne, 16; 12 E. C. L., 301.

† *Ubi supra*.

‡ 15 Wend., 496; afterward affirmed by the Court of Errors; see 18 id., 175.

chase, and it was held that the principal was still holden on failure of the agent to pay the note at maturity, unless it appeared affirmatively that he had sustained injury by the creditor thus dealing with the agent. The statement to plaintiff's salesman, that the coal was bought for the father of J. H. Edwards, was a disclosure of the principal. It indicated clearly who the principal was, and gave every opportunity of inquiry necessary to ascertain his full name, credit and residence. The case does not, therefore, come strictly within the authorities touching undisclosed principals. It stands upon the question whether exclusive credit was given to the agents. Of course in such a case, the sale is, legally speaking, made to the agents, and the seller is entitled to no recourse against the principal. If the jury had found that the credit was so given, the verdict could not under the evidence have been disturbed; nor do we think that a verdict the other way would have been so clearly unsupported that the court would have been bound to set it aside.

A new trial should therefore be granted, with costs to abide the event.

DANIELS and BRADY, JJ., concurred.

Judgment reversed and new trial granted, costs to abide event.

IN THE MATTER OF THE PETITION OF THOMAS R. AGNEW
TO VACATE AN ASSESSMENT FOR PAVING MADISON AVENUE.

*Chap. 446, Laws of 1857—chap. 580, Laws of 1872—chap. 818, Laws of 1874—
Assessment—effect of failure to publish notice.*

Under section 7 of chapter 446, Laws of 1857, it is sufficient if two days shall intervene between the publication of the notice, thereby required, and the passage of the resolution.

Matter of Bassford (50 N. Y., 509) and *Matter of Douglass* (58 Barb., 174) followed. Under the provisions of chapter 580, Laws of 1872, providing that "no assessment for any local improvement * * * shall hereafter be vacated * * * by reason of any omission to advertise, or irregularity in advertising any ordinance, resolution, notice or other proceedings," etc., this court has no power, except in cases of fraud or repavement, to vacate an assessment for a failure to publish the notice of the final passage of the resolution authorizing the improvement required by section 7, of chapter 446, Laws of 1857.

APPEAL from an order made at the Special Term, vacating an assessment for paving Madison avenue, in the city of New York, from Forty-second street to Eighty-sixth street.

It appeared, from the evidence, that the resolution and ordinance authorizing the improvement were introduced into the board of councilmen, July 1, 1868, adopted by that board November 9, 1868; introduced into the board of aldermen, November eleventh, and adopted by that board November sixteenth. That such resolution and ordinance were amended by inserting the "crosswalk" provision by the board of aldermen, December 3d, 1868; and by the board of councilmen, December tenth. That the only publications in the New York Leader were as follows: November 21st, 1868, of the proceedings of the board of councilmen, of November 9th, 1868, resolution adopted; proceedings of the board of aldermen, of November 11th, 1868, resolution received from the board of councilmen; proceedings of the board of aldermen, of November 16th, 1868, resolution adopted; November 28th, 1868, proceeding of the board of aldermen of November 19th, 1868, "crosswalk provision" introduced.

E. Delafield Smith and *William Barnes*, for the appellant. The proofs show that the resolution and ordinance were, in fact, published in the New York Leader as required by the seventh section of the charter of 1857. (*In re Douglass*, 58 Barb., 174.) The assessment in this case not being (or even claimed to be), in any respect a case of fraud, or of a repavement, within the exception of the seventh section of chapter 580 of the Laws of 1872, the same was, under and by virtue of the provisions of said section, adopted, rehabilitated and legalized by the legislature, and declared to be a valid and subsisting lien, notwithstanding any defective advertising, etc. Statutes validating void assessments and other illegal acts and proceedings, are ordinary and well established functions and prerogatives of the legislature, unlimited as to the manner and extent of their exercise, except by prohibitions, if any, contained in the Constitution. (*Matter of Van Antwerp et al.*, 1 N. Y. S. C. [T. & C.], 423, 425; approved by the Court of Appeals, April 7, 1874; *Mann v. The City of Utica*, 44 How. Pr., 334, per HARDIN, J.; *Matter of Ferdinand Meyer*, 50 N. Y., 504; *Litch-*

field v. Vernon, 41 id., 124; *People ex rel. Albany and Susquehanna Railroad Company v. Mitchell et al.*, 35 id., 551; *People v. The Mayor, etc., of Brooklyn*, 4 Comst., 419; *Guilford v. Chenango Co.*, 13 N. Y., 143; *Thompson v. Lee Co.*, 3 Wall., 327.) It is within its province by retrospective legislation, when not impairing the obligation of contracts, to give effect to the intention of parties through their contracts or other acts, although obnoxious to the provisions of existing statutes. Such as to a deed or act not duly acknowledged or otherwise defective. (*Watson v. Mercer*, 8 Peters, 88; *Thompson v. Morgan*, 6 Minn., 202; *Burnton v. Servers*, 12 Iowa, 470; *Chestnut v. Shane*, 16 Ohio, 509; *Jauncey v. Gibson*, 50 Penn., 57.) Or void under a prohibitory act. (*Washburn v. Leavitt*, 35 Barb., 599; *Beach v. Walker*, 6 Conn., 190; *Welch v. Wadsworth*, 30 id., 149.) "It may also confirm an imperfect sale of the real estate of minors." (*Suydam v. Bk. of New Brunswick*, 3 Green Ch. [N. J.], 144; *Dorsey v. Gilbert*, 11 Gill & J., 87; *Davis v. State Bk.*, 7 Ind., 316.) Or registry of a deed. (*Hughes v. Cannon*, 2 Hump., 589.) Or contract of a marriage imperfectly celebrated. (*Goshen v. Stonington*, 4 Conn., 210; *Goshen v. Richmond*, 4 Allen, 458.) Or an imperfect execution of judicial process. (*Mather v. Chapman*, 4 Conn., 54; *Beach v. Walker*, 6 id., 197.) Or confirm a tax according to a previous assessment. (*Locke v. New Orleans*, 4 Wall., 172.)

Herbert A. Shipman, for the respondent. The seventh section of chapter 580, Laws of 1872, as amended by chapter 313 of the Laws of 1874, does not cure the commission of a forbidden act; it relates wholly and solely to acts of omission. The failure to give notice as required by section 7, chapter 446, Laws of 1857, under which this assessment was laid, was a failure to acquire jurisdiction which is not cured by the act of 1872. Where the statute prescribes the mode of acquiring jurisdiction, the mode prescribed must be strictly complied with, or the decision will be a nullity. (*Bloom v. Burdick*, 1 Hill, 130; *Stanton v. Ellis*, 2 Kern., 575; *People v. Board of Police*, 6 Abb. Pr., 162; *Sharp v. Spier*, 4 Hill, 76; *Sharp v. Johnson*, id., 96; *Striker v. Kelly*, 7 id., 24; *Cruger v. Dougherty*, 43 N. Y., 107; *In the Matter of Douglass*, 46 id., 42; *Cruger v. Hudson R. R. Co.*, 12 id., 190; *Williams v.*

Haines, 49 id., 587; *Ireland v. City of Rochester*, 51 Barb., 414; 1 R. S., §§ 1, 2, chap. 4, part 1; *Rogers v. Spencer*, 55 N. Y., 1.) The want of notice, the failure to acquire jurisdiction, cannot be cured by subsequent legislation. (*Ireland v. City of Rochester*, 51 Barb., 414; *Matter of Beekman*, 1 Abb. [N. S.], 451; *Doughty v. Hope*, 3 Denio, 594; *Board of Water Commissioners v. Lansing*, 45 N. Y., 19; *McDaniel v. Correll*, 19 Ill., 226, 228; *Horn v. Baltimore*, 26 Md., 194.)

DAVIS, P. J.:

It is not at all clear that the proper publication was not made in the New York Leader, as required by the act of 1857. The ordinance and resolution as amended by the introduction of "the crosswalk provision," was adopted by the board of aldermen December 3d, 1868, and by the board of councilmen, on the 10th day of December, 1868. The petitioner showed that on the "preceding twenty-eighth of November, the 'proceedings of the board of aldermen of November 19th, 1868, crosswalk provision introduced,'" were published in that paper. It was doubtless under the amended resolution that the work was done and the assessment made; and that fact was substantially proved by the petitioner, by the introduction of the proceedings of the board of aldermen, of December 3d, 1868, and the board of councilmen of December 10th, 1868. If the amended resolution was properly published under the law, it does not seem to be important whether the original resolution was so published or not; because it never became operative as an ordinance, having been merged in the amended resolution, and never having received the sanction of the mayor. The amended resolution was published more than two days before its adoption by either body. It was published on the twenty-eighth of November, and the first adoption was the third of December following. In *The Matter of Douglass*,* this court held it to be sufficient "if two days shall elapse between the publication of the notice and the passage of the resolution;" and that "it is only necessary that two days after the publication of the notice shall intervene between the introduction of the resolution and its final passage by both boards of the common council."

*58 Barb., 174.

The Matter of Douglass was reversed by the Court of Appeals, but not on grounds affecting the point above referred to; and in *The Matter of the Petition of Sarah E. Bassford*, this court adhered to the ruling above quoted, distinctly asserting that the reversal of the Douglass case had not decided the question. The opinion of INGRAHAM, P. J., in *The Matter of Bassford* was on appeal adopted by the Court of Appeals, and may be found reported (in note) with *Matter of the Petition of Bassford*. * In the opinion of ANDREWS, J., in the last cited case, it is said: "In an application to vacate an assessment under this act" (the act of 1857) "the *onus* of establishing the alleged fraud or irregularity is *upon the applicant*. The party availing himself of the summary remedy given by the statute of 1858, must make it 'appear' that the alleged fraud or irregularity exists, before he is entitled to relief under it. * * * In the absence of proof that it did not do so" (that is, that the common council did not confirm the assessment) "*it cannot be assumed that the authority was not exercised.*" These salutary principles have been singularly obscured by subsequent decisions of the same tribunal. Yet, we venture to invoke them as establishing a presumption (if the proofs have not established the fact) that what was published in the Leader on the 28th of November, 1868, was what the law required; and the twenty-eighth being more than two days before the final passage of the amended resolution by *either* of the boards, the requirements of the charter of 1857 were complied with sufficiently to uphold the assessment. But if this be not so, we are decidedly of opinion that the case is within the effect of the seventh section of chapter 580 of the Laws of 1872, whether that be completely curative or merely restrictive as to remedies. This case is not one of alleged fraud or *repavement*. It is shown that six newspapers were designated to publish the proceedings of the common council. The proof of non-publication relates to but one of them. It must be assumed, therefore, that the publications were properly made in the other five papers. The alleged irregularity consists in the omission to publish, regularly, in one out of six. The statute requiring the publication has been held to be mandatory, and the omission was therefore a fatal irregularity, which would lead to the setting aside of

* 50 N. Y., 509, 511.

the assessment, by the special proceeding authorized by the act of 1858. But by section 7 of chapter 580 of the Laws of 1872, it is provided that assessments shall not be vacated for this and like irregularities unless fraud be shown (except in cases of repavement). This act has been held to be constitutional;* and in the same case it was said by the learned chief judge, that "the remedy by petition, under the act of 1858, is preserved, but the grounds for vacating assessments are restricted to actual fraud. * * * It was competent for the legislature to repeal the act of 1858 as to vacating assessments, and of course to regulate and limit it as they deemed proper."† The language of the act of 1872,‡ leaves no doubt but that a case of this kind was intended to be embraced. It provides that: "No assessment * * * for any local improvement or public work in said city * * * shall hereafter be vacated or set aside, for or by reason of *any omission to advertise*, or irregularity in advertising any ordinance, resolution, notice or other proceeding," etc. This language must operate to prevent or arrest legal proceedings under the act of 1858 to vacate or set aside such assessments; and in the absence of authority in the court to pronounce the judgment it does not seem to be very material whether the irregularity be one of commission or of omission, nor whether it rendered the assessment absolutely void or only voidable. The remedy is taken away; and the legislature have power to regulate and limit the remedy as they see fit.§ But an assessment is a tax; and in this case the assessment itself is regular in form, and presumably correct in all respects; but by reason of irregularity in the proceedings of the common council in ordering the work or improvement which has been made, and for the expense of which the assessment is imposed, it becomes illegal.

There seems to be no question, under the authorities, of the power of the legislature to interpose and make valid such an assessment. An act which in express terms should declare that it shall be

* Matter of Mayer, 50 N. Y., 504. † 40 N. Y., 561. ‡ Chap. 580, § 7.

§ See 50 N. Y.; 40 id., *ubi sup.*; People v. Mitchell, 35 id., 551; Lennon v. The Mayor, etc., 55 id., 361; Mann v. The City of Utica, 44 How. Pr., 334; Litchfield v. Vernon, 41 N. Y., 124; Matter of Van Antwerp, 1 N. Y. S. C. (T. & C.), 423, affirmed by Court of Appeals; Howell v. City of Buffalo, 37 N. Y., 267.

valid would be a constitutional exercise of the taxing power; and an act which takes away all legal remedies for vacating and setting aside such an assessment, ought to be held to have the same effect; although this point has not yet been determined by the court of last resort. *

The order of the Special Term should be reversed, with ten dollars costs besides disbursements, and the proceedings dismissed with costs.

DANIELS and BRADY, JJ., concurred.

Ordered accordingly.

THE PEOPLE EX REL. CHARLES W. WALKER *v.* THE COURT OF SPECIAL SESSIONS OF THE CITY AND COUNTY OF NEW YORK.

Indictment—abandonment of—Removal of case from General Sessions to Special Sessions—effect of, after indictment found—Dog—not beast of burden—what lawful use of.

Complaint was made before a police justice charging the relator with the commission of a misdemeanor under the acts for the prevention of cruelty to animals. The relator demanded a trial by jury. The case was sent to the General Sessions, where the relator was indicted and arraigned and pleaded not guilty. Afterward, with the assent of the district attorney, the relator applied to have the complaint sent back to the Special Sessions, which was done and an indorsement to that effect made on the indictment. The relator was brought before the Court of Special Sessions, pleaded not guilty, was tried and convicted, and moved, in arrest of judgment, that if his trial was on the indictment the court had not jurisdiction; if on the complaint, that that had been superseded by the indictment. *Held*, that the relator was to be deemed to have been tried on the complaint, and that the proceedings and assent of the parties should be considered as an abandonment of the indictment.

A dog, although not a beast of burden, may lawfully be used upon a treadmill or in any other serviceable employment; but if he is cruelly used, it becomes a crime.

* See opinion of CHURCH, Ch. J., in *The Matter of Van Antwerp*; *Lennon v. The Mayor*, 55 N. Y., 361.

CERTIORARI to the Special Sessions to review the conviction of the relator for a misdemeanor.

Charles W. Walker was arrested for cruelty to an animal in the city of New York, on May 18, 1874. On being arraigned before the police magistrate, he demanded a trial by jury at the General Sessions. He was indicted May 30, 1874, in that court, arraigned therein and pleaded not guilty, June 2, 1874.

Some little while thereafter, Walker, with his counsel, Charles F. Wetmore, Esq., appeared voluntarily at the bar of the Court of General Sessions, and a motion was made to remit the cause for trial to the Special Sessions. The clerk of the General Sessions thereupon entered on the back of the indictment, "Sent to Special Sessions by request of counsel, June 8, 1874."

On June 8, 1874, the complaint was sent by the Court of General Sessions to the Court of Special Sessions, for trial therein. Walker appeared, the charge stated in the complaint was then read to him, he pleaded not guilty thereto, the plea was entered in the minutes of the court, and the trial proceeded. When the evidence on both sides was closed, the counsel for the relator claimed that if the case was tried on the complaint, it was superseded by the indictment; if on the indictment, the court had no jurisdiction.

H. O. Southworth, for the relator.

B. K. Phelps, for the respondent.

DAVIS, P. J. :

Complaint on oath was made before a police justice on the 18th of May, 1874, charging the relator with a misdemeanor under the several acts for the prevention of cruelty to animals. The particular offense charged was the cruel treatment of a dog used by the relator on what is called a treadmill in the complaint. The relator was arrested, and on being arraigned before the police justice and on being informed of his rights, he demanded in writing a trial by jury of the complaint, and a trial at the Court of General Sessions of the Peace. The proceedings were thereupon sent to the General Sessions. On the thirtieth of May following, the relator was indicted in that court, and on being arraigned on the

2d day of June, 1874, pleaded not guilty. Afterward the relator and his counsel appeared in the General Sessions held by and before the recorder, and with the assent of the district attorney made application that the complaint be sent back to the Special Sessions for trial. The application was granted, and an entry to that effect was made by the clerk of the court on the back of the indictment. The return states that "subsequently, on the 8th of June, 1874, the said complaint was sent by the Court of General Sessions aforesaid, to the Court of Special Sessions in said city and county, for trial by the said last named court, as appears by an indorsement upon the said complaint in these words, to wit: 'Sent to Court of Special Sessions, by request of counsel, June 8th, 1874.'" On the eighth of October following, the Court of Special Sessions organized for the trial of misdemeanors, and caused the relator, as the return states, "to be brought before them for trial on the said complaint," and the charge in said complaint was distinctly read to the relator, and he pleaded thereto "not guilty," which plea was duly entered in the minutes. The court thereupon proceeded to try the issue. No objection whatever seems to have been made at this stage, to the jurisdiction of the court, or to the regularity of the proceedings; and none seems to have been suggested till after the close of the case for the prosecution; and no question of jurisdiction was distinctly raised till the evidence on both sides was closed. At that point the defendant's counsel said to the court: "If the case was tried on the complaint he would ask for an arrest of judgment; if on the indictment he would claim that the court had no power to try it by consent or otherwise." The court said it had nothing to do with the indictment; and after the court found the defendant "guilty on the evidence," the "defendant's counsel moved in arrest of judgment, on the ground that if the finding is upon the complaint, the complaint has been superseded by the indictment." The motion was denied and exception taken; and the relator was sentenced upon the conviction to pay a fine of twenty-five dollars. A record of the conviction and judgment was made in due form, and is annexed to the return. It cannot be doubted that the proceedings in the General Sessions, to send the complaint back to the Special Sessions for trial, were informal and irregular. But they were taken with the consent and at the request of the

relator and as matter of favor to him. Whether the relator could not, at any time before going to trial on the complaint at the Special Sessions, have insisted upon his right to be tried by a jury at the General Sessions on the indictment, notwithstanding all that had taken place in respect to remanding the complaint, is not the question here before us. He appeared before the Special Sessions, to which court at his request the complaint had been sent, and joined issue upon the complaint, and went to trial according to the legal course of procedure in that tribunal, ignoring and waiving for that purpose his former demand of trial in the higher court and the indictment therein, and in effect consenting to all the jurisdiction over the complaint that the Special Sessions could have had if he had originally elected to be tried by that tribunal. By the act of 1855 * jurisdiction is given to the Special Sessions to try complaints for misdemeanors, when made in the police courts, whenever the arrested party chooses to waive his constitutional right of trial by jury as provided by the act cited and its amendments. When he elects to be tried by jury in the court of General Sessions, the Special Sessions have no jurisdiction to try the case unless the party chooses to waive his election, and voluntarily go to trial upon the complaint in that court. If he does make such a waiver, and goes to trial upon issue joined on the complaint, there seems to be no sound reason for permitting him afterward to allege any objection to the jurisdiction of the court. The substance of this case is, that upon a complaint for misdemeanor, which it is not asserted was not within the jurisdiction of the Special Sessions originally to have tried, the relator had taken steps to secure to himself a right to be tried by jury on an indictment in the General Sessions; but he voluntarily waived that right and formally consented to be tried on the complaint by the Special Sessions. He could not consent to the trial of the indictment in that court, because the indictment could only be tried according to the course of the common law by a jury of twelve men, in a tribunal having jurisdiction to try such indictments. That was settled in *Cancemi's case*.† But it is quite another thing to consent to a suspension of proceedings on the

* Laws of 1855, chap. 837, § 5; 5 Edm. Stat. at Large, 178.

† 18 N. Y., 128.

indictment, and to go back and be tried on the complaint by the Special Sessions. It is in legal effect precisely like appearing upon a new complaint in the latter tribunal and consenting to a trial according to its course, although an indictment for the same misdemeanor be pending in the higher court. The Special Sessions would not in such case be without jurisdiction, and its conviction and sentence would not be void. What effect they would have upon the pending indictment, would be quite another question. The practical effect of what took place in the General Sessions with the consent of the district attorney, the relator and the court, should be deemed equivalent to an abandonment of the indictment, and doubtless a formal order of *nolle pros.* ought to be entered; but this question is one that will properly arise if ever any attempt is made to try the relator on the indictment after his conviction on the complaint.

This case is disposed of, we think, when we determine that the relator has not been tried upon the indictment at all, and so has not been deprived of any constitutional right guaranteed to him upon such a trial; and that he has been tried upon a complaint only by his own consent before a tribunal having jurisdiction of such complaints, and according to its legal forms of procedure; and that he failed on such trial to plead the pendency of the indictment, or to raise any question at such time and in such manner, that he can now be heard to allege error notwithstanding his own consent and submission to the jurisdiction. On the merits of this case there appear to be no reasons for interfering with the judgment. Although a dog is not a "beast of burden" yet it is not cruelty to train and subject him to any useful purpose. His use upon a "treadmill" or an "inclined plane," or in any mode by which his strength or docility may be made serviceable to man, is commendable and not criminal; but his *abuse* while so employed, whenever it amounts to cruelty, is a crime and punishable precisely under the same circumstances as the cruel usage of the higher animals. Evidence enough was given on the part of the prosecution to show harsh and unreasonable treatment of his dog by the relator, producing unnecessary pain and suffering, and it was for the court below to determine from the conflicting evidence whether the alleged cruelty was established.

We think the writ should be dismissed, and the proceedings of the Special Term affirmed.

DANIELS and BRADY, JJ., concurred.

Ordered accordingly.

THE HEBREW FREE SCHOOL ASSOCIATION, RESPOND-
ENT, v. THE MAYOR, ETC., OF THE CITY OF NEW
YORK, APPELLANT.

Chap. 282, Laws of 1852 — meaning of words "religious society" and "exclusively the property" in — Cloud upon title — Assessment upon property exempt by law.

Chapter 282 of the Laws of 1852, limiting the exemptions from taxation created by the Revised Statutes (1 R. S., 888, § 4, sub. 3) was not intended to require the property to belong exclusively to a religious society, organized as an incorporated church, but to a society whose organization and objects should be of a benevolent, charitable or missionary character, falling within the general sense of the term religious, as contradistinguished from private and secular institutions.

Where a religious society, within the meaning of the act, is the owner of a leasehold interest in certain land for a term of eleven years, with a privilege of renewing the lease upon the expiration of the said term, and the absolute owner of the building thereon, and such property is used as a school-house, the society being bound to pay all taxes and assessments, such property is the "exclusive property" of the society, within the meaning of the act, and is entitled to the exemption from taxation thereby created.

An action can be maintained by such a society to have taxes assessed against it declared void, where the proceedings are regular on their face, and extrinsic evidence is requisite to show the invalidity of the tax.

Where a tax is imposed upon property exempt by law, the omission to appear before the commissioner of taxes does not give validity to the assessment.

APPEAL from an order made at the Special Term, overruling a demurrer to the complaint.

The complaint alleges that the plaintiff is a religious, charitable, literary, scientific and educational corporation, created and organized March 13, 1865, pursuant to the act of the legislature entitled "an act for the incorporation of benevolent, charitable, scientific and missionary societies," passed April 12, 1848, and acts amendatory thereto. That the purpose of said corporation is to provide "for the gratuitous instruction of Jewish youth in the Hebrew

religion and language, and other branches of knowledge, and to promote the study of Hebrew literature."

That the corporation has become the assignee of a lease of certain premises, for a term of twenty-one years from November 21, 1864, with privilege of renewal, made by Hamilton Fish to Joseph Mayer, upon which premises was situate a building which was the property of said Mayer, and which he conveyed to the plaintiff.

That, by the covenant in said lease, the lessee and his assigns are bound to pay the taxes imposed on said premises. That the said house and lot are used by the plaintiff exclusively as a school-house or seminary of learning. That the said house and lot is known by the Ward No. 1,234, and taxes have been imposed thereon for the years 1869 and 1870. The plaintiff then alleges that its property is exempt from taxation; that it has been illegally taxed; and that the illegality complained of forms no part of the record, and can be established only by extrinsic evidence. The plaintiff then demands that the taxes be adjudged void, and the defendant and its agents enjoined and restrained forever from enforcing the same. Defendant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

E. Delafield Smith and *D. J. Dean*, for the appellant. The property in question is not exempt from taxation unless the plaintiff is a religious society. It is submitted that a corporation incorporated under the act of 1848, is not a religious society within the statute. Religious societies in this State are incorporated under a statute other than the statute under which the plaintiff was incorporated, viz., chapter 60 of the Laws of 1813, and the laws amendatory thereto. (See 3 R. S. [Edm. ed.], 687-704.) The tax which in the complaint is alleged to have been imposed upon real estate known as lot No. 1,234, in the Eleventh ward, was not imposed upon the property of the plaintiff. The fee of the lot in question, as appears by the complaint, is owned by Hamilton Fish. The interest of the plaintiff in the premises consists of: First, it owns the buildings situate thereon; second, it owns a leasehold interest in the lot for a term of years. Neither of the interests of the plaintiff is real estate, or liable to taxation as such. They constitute chattels,

taxable, if at all, as personal property. By its covenant with the owner of the fee the plaintiff has agreed, as a part of its rent, to pay the taxes which otherwise would be collected from the owner of the fee, and which he is primarily liable to pay to the defendants. Suppose the lease contained no covenant that the lessee would pay the taxes imposed upon the property, then it is clear that the owner of the fee only would be burdened by the tax imposed upon the property, and it would be his duty to pay the tax. It is, therefore, unreasonable that, by procuring a covenant from his lessee that it would pay the taxes, the premises should become exempt entirely from taxation, if the lessee should be a religious corporation. The premises are not *exclusively* the property of the plaintiff. The interest of the owner of the fee is inconsistent with the claim of the plaintiff, that it is the exclusive owner of the premises. An injunction to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, or some cause presenting a case of equity jurisdiction. (*Morse v. Smedley*, 6 Johns. Ch., 28; *Heywood v. Buffalo*, 14 N. Y., 534; *Susquehanna Bank v. Supervisors of Broome County*, 23 id., 312; *Dows v. The City of Chicago*, 11 Wall., 109; *Hannewinkle v. Georgetown*, 15 id., 547.)

Neville & Andrews, for the respondent. By reference to the statute (R. S., chap. 13, pt. 1, tit. 1, § 5, sub. 3), it will be seen that the exemption is of "every building," etc., and (but only incidentally) "the several lots whereon such buildings are situated," and by the sixth section it is the "building" that is to be exclusively used and to be exclusively the property, etc., so that it would seem that the use made of the "building" carries with it the exemption of the lot. (*Chegary v. Jenkins*, 5 N. Y., 376, where the plaintiff was not even owner of the building.) For the purposes of taxation, the plaintiffs are the owners of the lot, that is to say, if they were not exempt from taxation they are the parties to be taxed for the land. The plaintiffs have an estate for years, and are bound to pay taxes. During their term they are the owners of the lot. This is an estate recognized by statute. (3 R. S. [5th ed.], p. 10.) The tax is not against the land but against the person. (R. S. [5th

ed.], chap. 13, pt. 1, tit. 2, art. 1, § 1, p. 908.) The tax is a charge against the person, not against the land; the land is merely security for the tax. (*Colgate v. The Mayor*, 2 Kern., 140.)

DAVIS, P. J.:

It is provided by section 4, title 1, chapter 13, part 1 of the Revised Statutes, that "every building erected for the use of a college, incorporated academy, or other seminary of learning; every building for public worship; every school-house, court-house and jail; and the several lots whereon such buildings are situated, and the furniture belonging to each of them," shall be exempt from taxation. Chapter 282 of the Laws of 1852 provides that the foregoing provisions of the statutes "shall not apply to any such building or premises in the city of New York, unless the same be exclusively used for such purposes and exclusively the property of a religious society, or of the New York Public School Society."

The first point made on this appeal is, that the plaintiff is not a "religious society," within the meaning of the act of 1852, and therefore the property described in the complaint is not exempt, although used exclusively for the purposes of a school. This point is based upon the fact, which appears in the complaint, that the plaintiff is organized under the act entitled "an act for the incorporation of benevolent, charitable, scientific and missionary societies," passed April 12th, 1848, and not under chapter 60 of the Laws of 1813, and the laws amendatory thereof, which provide for the incorporation of religious societies. But we think the words, "a religious society," used in the act of 1852, were not intended to be used in the limited signification of church incorporations, or bodies organized for the mere purpose of establishing church societies, as provided by the act of 1813 and its amendments. It is true that the act of 1848 was not intended for the organization of religious societies in the sense of incorporated churches; but in the more general sense we see no reason why a body like the plaintiff may not be deemed a religious society, and as such the exclusive owner of property devoted to a school for religious and other instruction. Or, in other words, we think the act of 1852, in limiting the exemptions from taxation created by the Revised Statutes, was not intended to require the property to belong exclusively to a

religious society organized as an incorporated church, but to a society whose organization and object should be of the benevolent, charitable or missionary character, falling within the general sense of the term "religious" as contradistinguished from private and secular institutions. The second point, to wit, that the property taxed is not shown to be exclusively the property of the plaintiff, was very fully discussed by the court at Special Term. We concur in the conclusions of the learned judge in the opinion he pronounced on that question. The property is what is familiarly known as leasehold. The owner of the reversion, or fee, has executed a lease for a long term of years, for a stipulated rental, with the right of renewal for further terms, and with the usual provisions as to buildings that are or may be erected by the lessee or his assigns, and with covenants for the payment of all taxes and assessments lawfully imposed. The plaintiff is owner, by assignment, of such a leasehold interest, and absolutely of the buildings on the premises, subject to the provisions of the lease. As owner of the term and of the buildings on the demised premises, the plaintiff is, we think, exclusively the owner of the property for the purpose of enjoying the right of exemption under the statute above cited. It is upon its property *exclusively* that the taxes imposed must fall; for, in every practical sense, what is assessed and sought to be taxed is the interest owned and possessed by the plaintiff, and not the reversion of the owner in fee.

The question should be determined by its present practical results, and not by ultimate effects that may result from the modes by which the taxes can lawfully be enforced. The property in the premises of which the plaintiff is the owner, is exclusively its own. That property is exempt under the statute, because it is devoted to the use of a seminary of learning, and is the property of a religious society. Both as between itself and the city, and between itself and the owner of the reversion, the taxation is primarily upon the plaintiff's property; and we do not think that fact is disturbed by the fact that the tax may also be regarded as a lien both upon the term and the remainder. We concur therefore in the views expressed, and the result reached on this point by the court below.

The relief prayed for by the complaint seems to be appropriate

within *Heywood v. The City of Buffalo*,* because "the assessment, on the face of the proceedings to impose it, is a valid lien on the land, and extrinsic evidence is requisite to show its invalidity."

The tax having been imposed, without jurisdiction, upon property exempt by law, the omission to appear before the commissioner of taxes and object, did not give validity to the assessment. †

The order should be affirmed with costs, with leave to answer over on payment of costs.

DANIELS and BRADY, JJ., concurred.

Ordered accordingly.

THOMAS J. GIBBONS, RESPONDENT, v. ISAAC DAYTON,
PUBLIC ADMINISTRATOR, ETC., APPELLANT.

4	451
98	512
4h	451
80	AD 253

Tenancy from month to month—how terminated—notice.

Under a lease providing that the term of letting and hiring is for one month only, and will expire at noon on the first day of the following month, a tenancy from month to month is created, and neither party is bound to give any notice to the other in order to terminate it.

APPEAL from a judgment entered upon an order of this court, confirming the report of the referee in this proceeding.

The proceeding grew out of a claim for rent, filed by the plaintiff with the defendant as administrator of the goods, etc., of Anna Maria Merriam, deceased; which claim was referred by agreement of the parties, pursuant to the statute.

The claim is for rent of the second floor of the premises known as No. 165 Bleecker street, from May 1st, 1873, to April 1st, 1874. It appears from undisputed evidence, that Mrs. Merriam had resided in the premises a number of years prior to her death; that she leased the premises; that no lease was ever made between herself and the plaintiff, other than in the form of receipts for rent, of the following description:

* 14 N. Y., 534.

† The National Bank of Chemung v. The City of Elmira, 58 N. Y., 49.

THOMAS J. GIBBONS,
REAL ESTATE OFFICE,
118 (old No. 109) Bleeker street,
Between Greene and Wooster streets,
New York.
Office hours from 8 A. M. to 6 P. M.

Rent must be paid invariably in advance on the first day of the month.

NEW YORK, Sept. 1st, 1871.

Received from Mrs. Mary Merriam the sum of sixty dollars, for one month rent only, in advance, for second floor rooms in house No. 165 Bleeker street, ending October 1, 1871, at noon.

It being expressly understood between us, the tenant and agent, or landlord mentioned in this receipt, that this term of hiring and letting is for one month only, and will expire as aforesaid.

\$60.

THOMAS J. GIBBONS.

L. H. Arnold, Jr., and *John Todd*, for the appellant. The tenancy cannot be construed into a tenancy continuing to the 1st May, 1874. (1 R. S., 695, § 1; *People ex rel. Aldhouse v. Golet*, 14 Abb. Pr. [N. S.], 130.) A month's notice by the personal representatives of Mrs. Merriam to the plaintiff, after her decease, was unnecessary to terminate a tenancy which had already expired. (*People ex rel. Gleahill v. Schackno*, 48 Barb., 551; *People ex rel. Aldhouse v. Golet*, *supra*; *Mackay v. Mackreth*, 4 Doug., 213.) Whatever claim the plaintiff may have against the estate of Mrs. Merriam for storing her effects for July, it is clear that the defendant is not liable as a tenant for rent for that month. (*Pugsley v. Aiken*, 11 N. Y., 494.)

J. Warren Greene, for the respondent.

DAVIS, P. J. :

The appellant is public administrator, and as such was appointed administrator of the estate of one Anna Maria Merriam, deceased. The respondent presented a claim for rent against the estate, which being disputed, was submitted to reference, with the approval of the surrogate, in conformity to the statute in such case made and provided. Mrs. Merriam, the intestate, was the tenant of the respondent from month to month; she had been accustomed to receive, on payment of the monthly rent at the beginning of each month, an instrument acknowledging the receipt of the rent and

expressing the term and nature of the tenancy. Such an instrument was executed and delivered to her about the 1st of April, 1873, on payment of the rent for that month. About the first of May, Mrs. Merriam was taken sick and went to the house of a friend where she became so ill that she was unable to return to her rooms, and she remained at her friend's till her death which occurred on the 6th of June, 1873. Her furniture and other personal property remained at the rooms leased to her by respondent until about the 29th or 30th of July, 1873. About the twenty-eighth of July, the appellant received notice of the death of Mrs. Merriam, and was on that day appointed her administrator, and on the twenty-ninth or thirtieth of July removed all articles of any apparent value from the premises previously occupied by her, and about the same time sent the keys of the rooms to the place of business of respondent and left them with a boy in the office, with a message that they were the keys of such rooms. The respondent on learning that the keys had been sent to his office refused to receive them, and sent them back to the office of appellant. The clerk of the appellant also refused to receive them. On the sixteenth of February following, the respondent entered the rooms, cleaned them out and repaired them, removing the articles of no value left in them to the cellar of the building. The referee held, that the intestate was tenant from month to month, that there had been no lawful surrender of the premises, and that the appellant was liable for the rent down to the time of the entry of respondent on the 16th of February, 1874, at the rate of sixty dollars per month, and directed judgment accordingly.

It is very clear that the tenancy of the intestate was from month to month. Neither party was bound to give any notice to the other in order to terminate the tenancy at the expiration of any month. The landlord could have removed the tenant by summary proceedings without notice; and so the tenant could lawfully have left the premises at the expiration of any month without notice, and without being bound to pay further rent.*

The death of Mrs. Merriam did not change the character of the tenancy, and the appellant is not liable beyond the obligations that

* People ex rel. Gleahill v. Schackno, 48 Barb., 551; People v. Goelet, 14 Abb. Pr. (N. S.), 180.

rested and would have remained upon her had she continued to live and retain her possession down to the day when appellant removed the property and sent the keys to the respondent's office. She would in that case, have been chargeable with rent for the months of May, June and July; but her tenancy would have terminated with the month of July. The appellant acted promptly and with apparent good faith. He was appointed administrator on the twenty-eighth of July, and on the next day, or on the thirtieth, moved the furniture and everything of value from the premises and sent the keys to the landlord. This was a complete termination of the tenancy, and full notice that the term would not be renewed for another month. A few articles were left in the rooms, but they seem from the evidence to have been nothing more than worthless things which the referee finds to have been valueless. The rooms were excessively dirty; but the litter and filth, and worthless fragments and articles which tenants are often accustomed to leave behind them, have never been held to constitute a continuance of the tenancy. The landlord's remedy, if any, for such an injury is quite different from treating the tenancy as renewed by the omission to carry everything away whether valuable or not. The referee has charged the administrator with rent after the month of July, on the ground that there was no formal surrender by him of the premises to the landlord. No form was necessary under the facts of the case beyond a removal at or before the expiration of the month, and the restoration of the keys to the landlord so that he could enter upon possession. The case is not like that of *Pugsley v. Aiken*,* where the lease was for "one year and an indefinite period thereafter," for in this case the express terms of the lease are "that this term of letting and hiring is for one month only and will expire" at noon on the first day of the following month. There should have been a recovery therefore only for the rent of the months of May, June and July, with interest on each month's rent from the time it was payable.

The judgment should be reversed and a new trial granted, with costs of the appeal to the appellant, unless the respondent shall stipulate to modify the judgment by reducing it to the rent for the months above named and interest, in which case it may be affirmed

* 11 N. Y., 494.

as modified, without costs to either party on this appeal as against the other.

DANIELS and BRADY, JJ., concurred.

Ordered accordingly.

THOMAS CUNNINGHAM, PLAINTIFF IN ERROR, v. THE
PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS
IN ERROR.

4h	455
168 NY 18	

Forgery — Instrument not known to the common law — what constitutes forgery of such an instrument.

The prisoner caused to be engraved and printed what purported to be warrants drawn by the auditor of public accounts on the State treasurer of Mississippi, and had a seal made. He filled in the blanks of two warrants, but made no impression with the seal upon them. He then sent all the warrants and the seal to Mississippi. The warrants, by the law of Mississippi, were invalid without a seal. *Held*, that the instruments, being invalid on their face, were not the subject of forgery.

If a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making an instrument in a form not provided by the statute, even though it is so like the genuine as to be liable to deceive most persons.

APPEAL from a conviction in the General Sessions for forgery in the third degree.

The plaintiff in error was indicted for forgery in the third degree and brought to trial in the General Sessions on the 24th day of September, 1872.

The evidence showed that the prisoner procured to be engraved and printed two books containing blank warrants, purporting to be drawn by the auditor of public accounts of the State of Mississippi, upon the State treasurer of that State; and also procured a seal to be engraved. This work was done in the city of New York, under the prisoner's directions. He then filled up two of the warrants, and shipped the books so prepared, together with the seal and the signed warrants or drafts, to Jackson, Mississippi, where the package fell into the hands of the authorities. The prisoner was

subsequently arrested in this city, and admitted his agency in the scheme.

He was convicted of the forgery of the signed warrant found in the box with the books of blanks and the seal. There was no impression of the seal upon the warrant which was the subject of the indictment. He now brings error to review that conviction, upon various exceptions to the evidence admitted upon the trial, and also to the instruction of the learned recorder to the jury, that upon the indictment the prisoner could be convicted of forgery.

Wm. F. Howe, for the plaintiff in error.

B. K. Phelps, for the people.

BRADY, J.:

The prisoner was tried and convicted for forging warrants purporting to be drawn by the auditor of public accounts of the State of Mississippi upon the State treasurer of that State. The evidence established the facts that he procured them to be engraved and printed, and a seal also to be made, and that the work was done in this city. It also appears that he filled in the blanks of two warrants, and shipped or sent the books containing all the warrants signed and unsigned, together with the seal, to Jackson, Mississippi, where the package fell into the hands of the authorities. It also appears that he confessed his connection with the scheme upon his arrest, but there is no proof, other than the transmission of the drafts or warrants to Jackson, of any attempt on his part to utter them. He had not filled up all the warrants, because, he said, he had not sufficient data to do so satisfactorily. There was no impression of the seal upon the warrant which was the subject of the indictment, and for the forging of which he was convicted. It appeared upon the trial that the warrant was invalid, by the law of the State of Mississippi, without a seal. It would also seem that it lacked vitality because it did not purport to be registered. This does not distinctly appear however, although it was so declared by the recorder before submitting the case to the jury. The chief question presented on this appeal is, therefore, whether the instrument was one which, under

our laws, could be the subject of an indictment for forgery. The rule established by the adjudications in this State, and after a thorough consideration of the question, is, that if the instrument be invalid on its face, it cannot be the subject of forgery, because it has no legal tendency to effect a fraud. (*People v. Shall*, 9 Cow., 778; *People v. Fitch*, 1 Wend., 198; *People v. Wilson*, 6 Johns., 320; *People v. Stearns*, 21 Wend., 409; *People v. Harrison*, 8 Barb., 560.) And, as these cases show, there are many English decisions to the same effect. Whether, for instance, a bond or other instrument is of a form to be valid, is a question of law; if, therefore, a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making a false statutory one, in a form not provided by statute, even though it is so like the genuine as to be liable to deceive most persons. (2 Bishop Cr. Law, § 538, and cases cited.) Hence the decision in *People v. Harrison*, that an indictment would not lie for forging a certificate of the acknowledgment of a deed, when the certificate did not state (and was therefore imperfect) that the grantor acknowledged the execution of the conveyance. Legal forgery cannot be made out by imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon the legal crime, upon criminal breaches of perfect legal obligations. (Per COWEN, J., in *People v. Shall*, *supra*.) How clear soever the fraudulent purpose, unless the writing is sufficient to accomplish that purpose, it is not forgery, since, with a single exception, actions only, and not evil intentions, are punishable by the English law. (Hammond Digest, Forgery, ch. 1, § pl. 102.) The invalidity of the warrant upon its face, on which the case for the prosecution rested, judged by the principles stated, rendered it improper to convict the prisoner. The evidence on the subject of the locality in which the warrants were to be uttered, if there be any evidence relating thereto, shows that they were to be circulated in the State of Mississippi, because they were all sent there; and if the general public of this country are not chargeable with knowledge of the law of each State, it is at least incumbent upon them, when the obligations of a State are in the

market for barter, to examine them, and every prudent man would examine them, nay, investigate their origin and issue, to ascertain whether they were genuine and authorized by law. If, however, the rule be, that the knowledge of the law of each State must be restricted to its residents, as suggested in this case, it cannot be applied until a criminal attempt upon the citizen of another State is shown to have been made, and under such circumstances that he could not shield or excuse himself from the consequences of his presumed knowledge of the law. This case presents no feature of that kind. There was, as suggested, no attempt to use the warrants in this State. The inference to be drawn from the *modus operandi* of the prisoner and associates is, that they selected the State of Mississippi for the circulation of the warrants, as the most likely territory for the success of the enterprise. The duty of reversing the judgment rendered in this case seems to be imperative, for the reasons assigned.

DANIELS, J., concurred.

Judgment reversed, and new trial ordered.

THOMAS C. DOREMUS, APPELLANT, v. DAVID WILLIAMS,
RESPONDENT.

Debt—assignment of, by parol—Power of court of equity to compel assignor to execute written assignment.

A parol assignment of a debt, made upon a good consideration, is valid, both at law and in equity.

In a proper case the court will compel the assignor to execute a written instrument of assignment, but his failure so to do is no defense to an action, brought by him upon a promissory note, given by the assignee in consideration of the assignment to him of the claim.

APPEAL from a judgment in favor of the defendant, entered on the report of a referee.

Edward P. Wilder, for the appellant. The ownership of Doremus & Nixon's claim against the Long Island Navigation Company became vested in respondent when he made and delivered

his notes. The very making and delivery of the notes by Williams, and their acceptance by Doremus, concluded the transaction. (*Kessel v. Albetis*, 56 Barb., 362; *Sexton v. Fleet*, 2 Hilt., 485; *Davis v. Shields*, 26 Wend., 362.) No written assignment of said claim was exacted as a condition precedent on the delivery of the notes, nor was any written assignment necessary. The parol transfer was valid. (*Hooker v. Eagle Bank of Rochester*, 30 N. Y., 83, and cases there cited; *Prescott v. Hull*, 17 Johns., 284; *Briggs v. Dow*, 19 id., 95; *Ford v. Stuart*, id., 342.) The neglect or refusal of Doremus & Nixon to execute and deliver to respondent a written assignment of their claim, after the making and delivery of the notes in question, is no defense to this action. (1 Parsons on Notes and Bills, 200; *Moggridge v. Jones*, 14 East, 486; *Freleigh v. Platt*, 5 Cow., 494.)

Williams Brothers, for the respondent.

BRADY, J. :

This action was brought to recover on five promissory notes, made by defendant and payable to the order of the firm of Doremus & Nixon. At the date of the notes that firm held a valid claim against the Long Island Navigation Company, equal to the amount of the notes, for goods sold and delivered to them upon the order of the defendant, who was then president. The company, at the time the notes were given, was not able to pay its debts, and the defendant gave his notes for the amount of the plaintiff's demand, upon the consideration of the firm's assigning to him their claim against the company, which was agreed to, and the notes delivered. No formal or other assignment in writing was executed, and whether any such instrument was in fact presented to be signed, is a disputed question, and one upon which the evidence is conflicting. The notes were assigned after maturity to the plaintiff, the surviving partner of the firm of Doremus & Nixon, by the administratrix of Nixon. The referee found that no consideration for giving said notes was ever received by said defendant, and said firm never parted with any consideration therefor, a finding which seems to be predicated of the omission or refusal to transfer or assign the claim of Doremus & Nixon to the defendant. If it

be not based upon that fact, there is nothing upon which it rests. It is conceded by the plaintiff that the claim was to be assigned, although he asserts that no formal assignment was proposed when the arrangement about the notes was made between his firm and the defendant. The question presented on this appeal, it will be perceived therefore from this statement, is whether any written assignment was necessary, and, if yea, whether the refusal of the firm of Doremus & Nixon to make it, is a defense to this action. The notes were delivered without exacting the written assignment. The application for it was subsequently made. The transaction was complete, therefore, because the assignment of the claim was accomplished by parol. (*Sexton v. Fleet*, 2 Hilt., 485.) If two men agree for the sale of a debt, says Sir JAMES MANSFIELD in *Heath v. Hall* (4 Taunt., 327), and one of them gives the other credit in his books for the price, it is a good assignment in equity. (See, also, *Kessel v. Albetis*, 56 Barb., 362; and *Hooker v. Eagle Bank of Rochester*, 30 N. Y., 83; *Dix v. Cobb*, 4 Mass., 508; *Jones v. Witter*, 13 id., 304.) Under the Code an equitable assignment is equally valid in law. (Code, § 111; *Hooker v. Eagle Bank*, *supra*.) In this case the defendant gave his notes for the claim, and, having paid the consideration in the manner agreed upon, the claim passed to him by the oral assignment. It was a valid transfer in equity and in law. (Cases, *supra*.) The evidence does not disclose the fact, and, therefore, it would not justify the finding thereto, that the assignment in writing was a condition of the agreement to pay the debt of the Long Island Navigation Company. The delivery of the notes by the defendant without it, is strong presumptive evidence that such was not the understanding. The firm of Doremus & Nixon having thus disposed of their claim, could not enforce it against the company. They did not own it, for it had become the property of the defendant, and his right to collect it from the company was perfect. The referee was mistaken, therefore, in assuming that no consideration was given for the notes by the firm, and his finding on that subject was erroneous. As to the other branch of the question, namely, whether the omission or refusal to execute an assignment excuses the non-payment of the notes, it is only necessary to say that as such a ceremony was not a conditional part of the arrangement, and was not necessary to the validity of the defendant's

ownership of the claim, the omission could not in any way affect his rights. If, however, he desired to have a written instrument of assignment, he had his remedy and should have pursued it. It might be decreed him in an action for specific performance, if the facts and circumstances presented by his case warranted the exercise of the power of the court to enforce it. The omission to do it is no defense to the notes. (*Moggridge v. Jones*, 14 East, 486; *Freleigh v. Platt*, 5 Cow., 494.) The assignment might be necessary for his protection against a subsequent transfer of the debt, or to facilitate the collection of the demand, but, as we have seen, it was not essential to the validity of his title. And the evidence shows that the firm of Doremus & Nixon acted upon the proposition or fact that they had parted with the ownership of the demand against the company, and took no steps toward its collection from them. The necessity of a new trial is apparent, and it must be ordered, with costs to the defendant, to abide the event.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed and new trial ordered, costs to abide event.

THE PEOPLE EX REL. LUCY S. DEVELIN, APPELLANT,
v. THOMAS B. ASTEN AND OTHERS, BOARD OF ASSESSORS
OF THE CITY OF NEW YORK, RESPONDENTS.

Chapter 697 of 1867 — construction of — Grade of streets — damages for change of — where grade not established by law.

The act (chap. 697 of 1867), authorizing the commissioners of Central park, New York, to alter and amend the present grade of any street, avenue or road, that might be retained by them, and to establish new grades for all other streets within a certain boundary, refers to the existing grade of any road or street used as such, although such grade may not have been formally established by any law or ordinance of the common council. (DAVIS, P. J., dissenting.)

APPEAL from an order of the Special Term, denying a motion for a mandamus.

This is an application on the part of the relator for a writ of peremptory mandamus directed to the respondents, the board of

assessors, commanding said board, or its members, to ascertain the loss and damage sustained by the relator by reason of the amendment or change of grade in One Hundred and Thirty-eighth street, in the city of New York, between the boulevard and Twelfth avenue.

The facts alleged in the relator's affidavit upon which the application was made are as follows:

First. That the relator is, and for many years has been, the owner of property having a frontage on One Hundred and Thirty-eighth street of 375 feet, upon which is erected a dwelling-house, out-buildings and fences, which property is located between the boulevard and Twelfth avenue, and which buildings were erected more than ten years last past.

Second. That many years prior to 1867 said One Hundred and Thirty-eighth street was opened as a public road or street, and that thereafter, up to the year 1871, was traveled and worked upon an established grade, and was the only means of access to said buildings and lots.

Third. That in the year 1868 the commissioners of the Central park, acting under chapter 697 of the Laws of 1867, greatly amended, altered and changed the grade of said street, and began to grade a portion thereof to conform to said new grade.

That, in the year 1872, the commissioners of public works, pursuant to an order of the common council, proceeded to finish such regulating and grading, and to curb and gutter said street between the boulevard and Twelfth avenue.

Fourth. That the present grade of said street, as established and regulated, is from fifteen to five feet higher than the old grade.

Fifth. That the damage to the relator by reason of the change of said grade is \$7,750.

That the respondent, the board of assessors, have proceeded to levy an assessment for the cost of said work upon the property benefited; that, although the relator had presented to the board of assessors her petition requiring said board to ascertain the loss and damage sustained by her by such change of grade, the board had refused so to do.

W. C. Trull, for the appellant.

T. B. Clarkson, for the respondent.

BRADY, J. :

The relator was, and at the time of the presentation of her petition had been for ten years, the owner of property situate and fronting on the north side of One Hundred and Thirty-eighth street, in this city. There were erected upon it a dwelling-house, out-houses, and fences. For many years prior to 1867 the street named had been used as a public street or road, and thereafter, up to the year 1871, was traveled upon as a road or street, and was the only means of access to said houses and lots. The commissioners of Central park, under and by virtue of chapter 697 of the Laws of 1867, and in the year 1868, changed the grade of the street, and, in 1869, began to conform it to such change, and, in 1872, proceeded to finish it, and to curb and gutter the street upon the new or changed grade. The relator, having suffered damages in consequence of these proceedings, asked the board of assessors to ascertain and award her the damages to which she had been subjected, and they refused to do it. The refusal seems to rest on the proposition that the grade of One Hundred and Thirty-eighth street had not been fixed or established by any law or ordinance of the common council of the city of New York. This is inferred from the affidavit read on behalf of the city on the motion which the relator made for a mandamus, and which was denied. The act of 1867, *supra*, authorized the commissioners, among other things, to alter and amend the present grade of any street, avenue or *road*, that might be retained by them, and to establish new grades for all other streets within a certain boundary which includes the plaintiff's property. The present means the existing grade of any road or street used as such. It may be that the grade of One Hundred and Thirty-eighth street was not formally established by any law or ordinance of the common council relating to that subject, or having that object expressly in view, but the street or road had been used, and had been recognized as an existing street or road by the legislature. The act of 1864 (chap. 405, § 1, Laws 1864, 940), contains an appropriation to repair it, and in these words: "Roads and avenues as follows: The sum of \$4,000 for One Hundred and Thirty-eighth street." It could not be used as a street or road without a grade, and the act of 1867, by the power it confers, contemplates a change, not only

from grades established by law or ordinance, but those existing and at present adopted by general use. The language employed is not to alter and amend the established grade or one made in accordance with any law or ordinance expressly relating thereto, but the present grade; that is, the grade of the street or road as existing and used. Indeed the use of the word "road," shows that it was not the intention of the legislature to confine the award to owners whose property fronted on streets, the grades of which had been established by ordinance. The grades of roads on this island have not been established by ordinance of the common council. The act of 1852 (chap. 52), which relates to the change of established grades, provides for them expressly. Section 1 declares that the grades of the streets and avenues of the city, as now fixed and established by the common council, shall not be changed or altered, except, etc. The act of 1867 authorizes the commissioners of Central park to alter and amend the present grade of any street, avenue, road, etc.; and, by section 3, declares that all damage to any land, or to any building or other structure thereon, existing at the time of the passage of the act on any street, avenue or road, laid out on the map of the city of New York within the district specified, shall be ascertained, etc. The difference between established and existing grades would seem, by comparison of these statutes, to have been in view when the act of 1867 was passed, and hence the use only of the language "present grade of any street, avenue or road," which means either by law duly established, or existing and in use by the public. To construe it otherwise would do injustice. It would deprive owners, as in this case, of all indemnity, who, accepting the existing and established grade established by general use and recognition, built in conformity to it, taking only by the proceeding, properly regarded, the risk of such changes as might be made at some subsequent time. For these reasons the answer made as suggested was not sufficient. It is not denied that the street or road was used as such, and duly recognized as one existing, but only that the grade had not been fixed or established by law or ordinance. It is not true that the grade is not fixed or established by law. It may be, by the general use of the public as it exists, become a grade established by law. The evidence shows that to have been so in regard to One

Hundred and Thirty-eighth street, and the recognition of it as a street or road by the legislature (*supra*), confirms the general use and the then "present" existing grade. The result of these views is, that the relator's application to have her damages ascertained and awarded should have been granted, and that the motion for a mandamus should, therefore, also have been granted. The order made at Special Term should be reversed.

DANIELS, J., concurred.

DAVIS, P. J. (dissenting):

I am not able to concur in the views of my brethren. In my opinion, the statute under which the relator asserts her claim was only intended to give damages in cases where the owner of the land had conformed the buildings thereon to a grade established by law or ordinance and in reliance upon the action of the public authorities, and not to cases where the natural surface of the ground over which a street has been laid, has been voluntarily assumed to be the grade by the party erecting such buildings. In the latter case, the party acts with knowledge that the grade of the street has not been officially established, or, in other words, that there is no "*grade*." He must be held to know that one of the steps necessary to complete the street will be to establish a grade, and to change, so far as required, the natural surface for that purpose. The views of the court, as it seems to me, extend the statute beyond its reason or intent; for it was adopted, as to me seems apparent from an examination of the several statutes relating to the same subject, to change the law as established by the decisions of the courts, in favor of persons who, in reliance upon official acts by which the grade of a street had been fixed and established, have been led to erect buildings conforming thereto, by allowing to such persons the damages sustained by the establishment of a new and different grade. In such a case the owner of the buildings has a right to complain that the official acts have induced him to put himself into a position to suffer damage from a subsequent change of grade, while the person who builds in conformity to the natural surface, assumes to judge for himself that such surface will be adopted, when the street comes to be worked and completed, as the established

grade. His misjudgment is his own fault, and he cannot be said to have been misled, or induced by the public authorities to act with regard to a condition of things established by law or public ordinance.

In my opinion the order below should be affirmed.

Order reversed and mandamus ordered.

PETER S. MARCH AND OTHERS, RESPONDENTS, v. THE FIRST
NATIONAL BANK OF MOBILE, APPELLANT.

Bill of exchange—acceptance of, induced by fraudulent concealment of facts.

In an action for fraudulent concealment by which the plaintiffs were induced to accept a bill of exchange, it was *held*, that if a bill of lading was exhibited at the time of the presentment of the bill of exchange for acceptance, and the plaintiffs were thereby induced to believe that the bill of exchange was secured by certain cotton mentioned in the bill of lading, and if, at the time of such presentment, defendant knew that the cotton had not been paid for and that steps were being taken to reclaim it, and such facts were concealed from plaintiffs with the intention of inducing the acceptance of the bill of exchange, upon the faith of the security of the cotton, and the bill of exchange was accepted upon the faith that the bill of lading was a valid bill for the cotton described in it, the plaintiffs were entitled to recover.

APPEAL from a judgment for plaintiff, entered on a verdict.

The action was brought for an alleged fraudulent concealment by the defendant, whereby the plaintiffs were induced to accept a bill of exchange. The plaintiffs alleged that on or about the 7th day of July, 1870, certain persons, doing business at Mobile under the name of Stannard Brothers & Co., shipped to New York 215 bales of cotton, to be delivered to order on payment of freight, dangers of the seas, etc., excepted, and they received a bill of lading therefor, which they indorsed in blank and delivered to the defendant, whereby the defendant became the owner and consignee of the said cotton, with full power to receive and hold the same. That the said Stannard Brothers & Co. did also, at or about the same time, draw a draft upon the plaintiffs, dated 9th July, 1870, whereby they requested the plaintiffs, thirty

days after sight, to pay the defendant \$17,985.32 in currency, and to charge the same to their account as advised, and delivered the draft, unaccepted by the plaintiffs, to the defendant. That the defendant received the said bill of lading and draft, and, after indorsing upon the said draft the words "Pay 3d N. Bk., N. Y., or order, for collection account First National Bank, Mobile, Ala.," and after writing on the bill of lading, over the blank indorsement of the shippers, the words "Pay 3d National Bank" (meaning thereby that the cotton therein mentioned should be delivered to the said Third National Bank), sent the said bill of lading and draft to the Third National Bank of the city of New York, with instructions, in substance and effect, to present the said draft to the plaintiffs for acceptance, and if accepted, to retain and collect the same at maturity, and place the proceeds thereof to the credit of the defendant, and to retain the said bill of lading, and to receive and hold the cotton therein mentioned until the said draft should be accepted and paid, and then to deliver the same to the plaintiffs.

That the said Third National Bank having, as the agent of the defendant, received the said bill of lading and draft so indorsed for the purpose aforesaid, the defendant, by and through the said Third National Bank as its agent, did afterward and on the thirteenth July, in the year last aforesaid, cause the said draft to be presented to the plaintiffs, at the city of New York, for acceptance, and in order to induce the plaintiffs to accept said bill, did also at the same time exhibit to the plaintiffs the said bill of lading, and did thereby then and there, in substance and effect, represent, state and give the plaintiffs to understand and believe, that the defendant was the legal owner or pledgee of the cotton mentioned in the said bill of lading, and had power to dispose of the same. That thereupon the plaintiffs, relying upon the truth of the statements and representations, and upon the promise so made, accepted the said draft. That the plaintiffs accepted the said draft solely upon the faith of the representations and statements of the defendant, so made by or on its behalf as aforesaid. That the representations and statements so made by and on behalf of the defendant as aforesaid, and upon the faith of which the plaintiffs accepted the said draft, were not true, because the defendant was not such owner or pledgee of the

said cotton, with power to hold and deliver it to the plaintiffs on payment of the said draft, as the defendant claimed and pretended to be, but, on the contrary, as the defendant well knew, the said cotton was then and there subject to liens in favor of certain persons at Mobile, commonly called factors, for unpaid purchase-money, which several liens were prior to any right, title or claim thereto by the defendant, and the said cotton was liable to be reclaimed and taken from the said steamer to satisfy such liens. That a large number of suits were commenced by the said factors as such lienors of said cotton as aforesaid, in the Circuit Court of Mobile county, Alabama, against the master of the said steamer; that process of law was thereupon issued, under and by virtue of which the sheriff of the said county, with the knowledge of the defendant, did, on or about the eighteenth of July, in the year last aforesaid, levy upon, seize, take and remove 212 bales of cotton out of said steamer, being parcel of the aforesaid 215 bales of cotton, and held and still holds the same, to satisfy the aforesaid liens thereon, which liens amount to, or about, or nearly, the value of said cotton. That said Stannard Brothers & Co. have failed in business and become insolvent. That afterward the draft fell due and the plaintiffs were obliged to pay it.

The answer admitted the shipping of the cotton; its seizure; the indorsement of the bill of lading; its presentment with the draft; the acceptance of the latter; the insolvency of Stannard Brothers & Co.

And the defendant alleged, that at various dates during said time, and in the course of said business between said Stannard Brothers & Co. and the plaintiffs, the said Stannard Brothers & Co. negotiated to the defendant numerous drafts drawn by them upon the plaintiffs, all of which were duly and regularly accepted and paid by the plaintiffs, and that the defendant thereby, and by the course of dealing between said Stannard Brothers & Co. and the plaintiffs, was induced to believe, and at the time of the negotiation to the defendant of the draft mentioned in the complaint did believe, that the said Stannard Brothers & Co. were authorized by the plaintiffs to draw and negotiate, at said city of Mobile, drafts on the plaintiffs, and that the defendant was induced thereby to purchase, and on the faith thereof did, in the usual course of its busi-

ness, in good faith and without notice or knowledge of any irregularity connected therewith, purchase from said Stannard Brothers & Co. the said draft in the complaint mentioned, receiving at the same time from said Stannard Brothers & Co. the said bill of lading, as further security for the payment of the amount of said draft as aforesaid.

And the defendant further alleged that the said Stannard Brothers & Co. were authorized by the plaintiffs to draw the draft mentioned in the complaint, and to negotiate the same to the defendant as aforesaid.

The judge charged the jury: "I charge you that if the jury believe that by the exhibition of the bill of lading at the time of and in connection with the presentment to the plaintiffs of the bill of exchange for acceptance, the defendant intended to mislead the plaintiffs into the belief that such bill of exchange was actually secured by the pledge of the cotton described in said bill of lading; and if the jury further believe that before the bill of exchange was accepted, the defendant knew that the cotton described in the bill of lading had not been paid for, and that the vendors to Stannard Brothers & Co. were taking steps with a view to reclaim it, under the law of Alabama, and intentionally concealed these facts from the plaintiffs, in order to lead them to accept the bill of exchange upon the faith of the security of the said cotton, and they accepted such bill on the faith of the bill of lading being a valid bill for the cotton described in it, they have a right to recover against the defendant the damages resulting from the bill of lading being a defective or insufficient security; otherwise not."

The jury rendered a verdict for the plaintiffs for the sum of \$21,541.90.

Wm. H. Scott, for the appellant.

S. P. Nash, for the respondents.

DAVIS, P. J. :

The questions presented by this case are by no means free from doubt, and they well deserve the consideration of the court of last resort. The bill of exchange drawn by Stannard Brothers & Co.

on the plaintiff's firm, made no reference to the bill of lading. It was sent to the agent of defendants in the city of New York, pinned to the bill of lading, properly indorsed to the defendants. This was notice to the agent that the bill had been drawn against the cotton described in the bill of lading, and that the latter bill and the title of the property had been transferred to and were held by the defendants as security for the acceptance and payment of the bill of exchange.* The agent of the defendants was thereby authorized to present the bill of exchange to the plaintiffs for acceptance, with the bill of lading annexed, which act was equivalent to saying that the bill of exchange had been drawn against the cotton mentioned in the bill of lading, the title of which was held as security by the defendants, and would, upon acceptance, become the security of the plaintiffs.† It was shown that the bill of exchange was presented to the plaintiffs on the thirteenth day of July. At the time of presentation, the bill of lading was annexed and presented to the plaintiffs, but was taken off by the person presenting the papers, on leaving the bill of exchange for acceptance. The plaintiffs were entitled to the possession of the bill till the next day, before accepting. They were called upon in the afternoon of the thirteenth and requested to accept, but declined; on the fourteenth they made their acceptance and delivered the bill to the agent of defendants, by whom, under instructions from defendants, it was sold to a *bona fide* purchaser at a discount, and without recourse. Evidence was given tending to show that before the fourteenth of July the defendants knew that the cotton was claimed by the factors who had sold the same to Stannard Brothers & Co., on the ground that it had not been paid for by that firm, and that as early as the twelfth, and certainly on the thirteenth, the defendants had reason to believe that the bill of lading was not security of any value in their hands, and that with this knowledge they hurried up their agent by divers telegrams to procure immediate acceptance, saying nothing of those facts either to the agent or to plaintiffs. If the withholding of their knowledge of the true state of affairs in relation to the value of the bill could in law charge the defendants on the ground of fraudulent

* Cayuga County Bank v. Daniels, 47 N. Y., 631; Marine Bank of Chicago v. Wright, 48 id., 1.

† The Marine Bank of Chicago v. Wright, *ubi supra*.

concealment, enough evidence on that subject was given to carry the case to the jury. The court, in submitting the case to the jury, left it to them to say "whether, in presenting the bill of exchange to the plaintiffs for acceptance, with the bill of lading attached to it, the defendants intended to convey to the plaintiffs the idea that it was a bill of exchange secured by the cotton described in the bill of lading," and he instructed the jury that if they did not find such to have been the intent, that was the end of the case. He instructed the jury also, that to entitle the plaintiffs to recover, they "must find that the acceptance was upon the faith of the exhibition of the bill of lading alone. If it was on the credit of Stannard Brothers & Co., or upon any request from them, or for any other reason, the plaintiffs cannot recover." He charged also, that the element on which the case could alone stand was fraud, and that if they found as above stated in respect to the intent in presenting the bill of lading with the bill of exchange, they should then inquire whether the defendant knew at the time that it was not true that the cotton was any security for the bill of exchange; and finally he submitted, as he said, "the proposition which contained the whole law of the case," in these words: "I charge you that if the jury believe that by the exhibition of the bill of lading, at the time of and in connection with the presentment to the plaintiffs of the bill of exchange for acceptance, the defendants intended to mislead the plaintiffs into the belief that such bill of exchange was actually secured by the pledge of the cotton described in said bill of lading; and if the jury further believe that before the bill of exchange was accepted, the defendants knew that the cotton described in the bill of lading had not been paid for, and that the vendors to Stannard Brothers & Co. were taking steps with a view to reclaim it, under the law of Alabama, and intentionally concealed these facts from the plaintiffs, in order to lead them to accept the bill of exchange upon the faith of the security of the said cotton, and they accepted such bill on the faith of the bill of lading being a valid bill for the cotton described in it, they have a right to recover against the defendants the damages resulting from the bill of lading being a defective or insufficient security; otherwise not." Doubtless, if the bill of exchange had been sent alone and accepted by plaintiffs, they would have had no redress against the defendants, however well the failure of

the bill of lading as security might have been known to them. The defendants were under no obligations to make any disclosure of facts to the plaintiffs to prevent their acceptance of the bill, but they were also under obligations to do nothing and say nothing, with knowledge of the real facts, which would operate to secure an acceptance by an expression of falsehood or a suppression of truth. Knowing that the bill of lading was of no value, the defendants had no right to induce the acceptance of the bill of exchange, by presenting the bill of lading as one of value, concealing their knowledge of its true character. In the cases cited by the learned counsel for the defendants, where the bill of lading turned out to be a forgery, it can hardly be doubted that if the holder of such a bill had presented it annexed to the draft as a genuine one, *with knowledge that it was in fact forged*, and in silence on that subject, he would not be heard to say that there was no fraud in inducing an acceptance by presenting the false appearance of security when he knew that in reality he was giving commercial currency to a forgery.

We think the judgment should be affirmed.

DANIELS and BRADY, JJ., concurred.

Judgment affirmed.

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JAMES McDONNELL, RESPONDENT, v. THE MAYOR, ETC.,
OF THE CITY OF NEW YORK, APPELLANT.

Chapter 618 of 1873, chapters 122 and 308 of 1874 — when claims under, must be presented for audit — Westchester county — towns of, annexed to New York city.

Under the provisions of the acts providing for the annexation of a portion of Westchester county to the city of New York, one who has a valid demand, duly certified, against a town therein, for the erection of a school-house, cannot maintain an action against the city thereon, until it has been audited by the board of education of the city of New York.

APPEAL from a judgment in favor of plaintiff, entered on the verdict of a jury.

D. J. Dean, for the appellant.

W. C. Reddy, for the respondent.

DAVIS, P. J.:

The claim upon which the recovery was had in this action has never been audited by the board of education of the city of New York. The obligation upon the comptroller as the financial officer of the city to pay the claim, is dependent upon the fact that the board of education of the city has audited and allowed the claim. The legislature, in transferring the indebtedness of the annexed towns to the city of New York, had the right to establish that safeguard against fraudulent and exorbitant claims, and to impose it as a condition precedent to the obligation to pay. The question on the trial, was not who was bound to present the claim for audit by the board or who must procure the auditing to be done. The question was, has it been done on any one's presentation or procurement. If the plaintiff was not able to show that the audit had taken place, he failed to show that his right of action was ripe. If it were, as suggested, the duty of the comptroller to have the account audited, that officer if he unjustly refused to perform the duty should have been set in motion by mandamus. If it was the duty of the board of education to audit without presentation by any one, the same remedy would set that body in motion. If the duty rested upon the plaintiff he should have taken the necessary steps. It is not enough to show that the claim is a just one; nor that it received the approval of the local officers of the town by which the debt was created; because, however essential those things may be, they do not alone answer the requirement of the statute which imposes the debt on the city. The case is analogous to those in which the certificate of a public officer or of some designated person is requisite by statute or by contract before payments can be claimed. In such cases it is settled by many authorities that the certificate must be produced; or that it was fraudulently and unjustly withheld or refused after proper application.

It follows that the absence of all evidence that the claim had been audited by the board, or that the condition required by the statute had become impossible of performance, or such other excuse as the law will accept in place of such performance, the plaintiff failed to show that the liability of the defendants to pay the

indebtedness had become a legal obligation which can be enforced by suit.

The plaintiff was not, therefore, upon the evidence given by him, entitled to recover, and the judgment must be reversed and a new trial ordered, with costs to abide the event.

DANIELS, J., concurred.

BRADY, J. (dissenting):

The plaintiff made and completed a contract to erect a school building in West Farms, Westchester county. It was made with the proper officers, and the claim therefor remaining unpaid was duly certified, so that it became a valid demand against the town. Under the provisions of the act of the legislature annexing certain parts of Westchester county to this city, all the debts and obligations of the several boards of education in either of the towns annexed, of which West Farms was one, were charged upon and declared to be the debts and obligations of the mayor, aldermen and commonalty of the city of New York. (Laws of 1873, chap. 613, § 8; Laws of 1874, chap. 122, § 2; *id.*, chap. 308, § 1.) The only defense offered on the part of the defendants, upon the trial, was, that the plaintiff's claim had not been audited by the board of education of the city of New York, and that there was no appropriation for the purpose of paying it. The former purpose is based upon a provision in section 8 (*supra*), which declares that the board of education of the city of New York shall audit and examine, and the comptroller shall pay, all the obligations of the several boards of education existing in the towns annexed, and which have thus been audited and examined, and which shall have been legally incurred prior to the 1st of January, 1874. It will be perceived, that it is not by the terms of the statute made the duty of the creditor to present his claim for audit. It is made the duty of the board of education to audit and examine, and that of the comptroller then to pay. If this were a proceeding by mandamus, to compel the board of audit or the comptroller to pay, and it could be entertained because the plaintiff had no remedy by action, the objection made would be fatal. The comptroller is to pay on the audit and examination of the board of education, but the city is to pay the debt

whether the audit thus contemplated is made or not. It is charged upon the city. The claim herein was presented to him as required by law, and the opportunity was therefore given him to have the audit and examination, if he required it, either for his own protection against a mandamus, or that of the city, if the audit revealed fraud or illegality in the claim made, and which might be interposed as a defense thereto. The plaintiff was not obliged by the act, as suggested, to have the audit made to give him a right of action. This claim was a legal, subsisting one when the act of 1874 (chap. 329, § 8), was passed. It became a debt of the city, and one therefore which the city is bound to pay. The consideration of the obligation was the land annexed, with its appurtenances. The school-house erected by the plaintiff passed with it. The courts have not favored the retrospective operation of statutes so as to take away a vested right. (*Dash v. Van Kleeck*, 7 Johns., 477; 4 Burr., 2560; 2 Shower, 17; 2 Mod., 310; 1 Vent., 330; *Ganson v. City of Buffalo*, 1 Keyes, 454.) And there is nothing in this case which would warrant a departure from that rule. The plaintiff's claim was due and unquestioned by the original obligors who made the contract and received the benefit of the plaintiff's labor and materials. The statute took the consideration of his demand, and transferred it to the city, but at the same time imposed upon the city the duty of paying any debt relating to it legally due. The cases upon which the defendant relies to sustain the point considered, are adjudications on proceedings for a mandamus, and we concede therein their full force, but say they have no application to this controversy. The absence of proof of no appropriation was not urged on the argument, and is not stated on the points submitted. It is regarded as abandoned therefore, but if to be considered, is overruled as untenable so far as the right of the plaintiff to a judgment is concerned.

I think the judgment should be affirmed.

Judgment reversed and new trial ordered, costs to abide event.

ISIDOR WORMSER, APPELLANT, v. ISABELLA GARVEY,
RESPONDENT.

Contract of sale of real estate — Specific performance — right to impose conditions.

The plaintiff agreed to purchase certain real estate of the defendant, the contract providing that in case the defendant was unable to give a good title at the time therein named, or in case an injunction or attachment should issue to prevent her disposing of the property, the amount paid on the contract should be refunded and the contract rescinded. At the time named, plaintiff refused to fulfill the contract unless defendant would sign an affidavit in regard to the solvency of her grantor; defendant refused to do so, tendered back the amount received, and declared the contract at an end.

In an action for specific performance, *held*, that the plaintiff had no right to require the defendant to sign the affidavit, and that her insisting upon it was equivalent to objecting to the title, and that defendant was thereby authorized to rescind the contract.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

In the month of September, 1871, one Andrew J. Garvey, the owner of certain premises in the city of New York, situate on Madison avenue, between Sixty-seventh and Sixty-eighth streets, conveyed said premises to his brother, John Garvey, for a nominal consideration, and John Garvey conveyed them to the defendant, the wife of Andrew J. Garvey.

The defendant, being desirous of disposing of this property, to pay claims which were pressing, offered the same for sale, and it was placed in the hands of Messrs. Kennelly & Fox, real estate brokers. These brokers negotiated with the plaintiff's agent for its sale, and the terms of a bargain were finally closed at the house of Simon Wormser, who was acting as attorney for the plaintiff, on the evening of December 18, 1871, Mr. John Garvey acting as the attorney for the defendant.

The defendant at first claimed that there should be a payment of \$10,000 made on the signing of the contract, but the plaintiff's agent refused to pay that amount to John Garvey, and it was finally arranged that the payment should be fixed at \$500, as the contract was to be closed so soon. By the terms of the contract the plain-

tiff was to pay \$215,000 for the property, and was to be allowed, upon the closing of the title, for all mortgages, taxes or assessments which affected the premises sold; and the balance of the purchase-money was to be paid in cash at ten o'clock, A. M., of the twenty-sixth of December, at No. 7 East Forty-seventh street, New York city. This agreement further provided that in case any legal proceedings, in the nature of attachments, injunctions or otherwise, should prevent the defendant, from conveying, or should incumber the title to the premises, or in case the title should be in any way defective, or in case the defendant could not give a good and sufficient title, the agreement should be canceled, and the \$500 returned.

After the signing of the contract, the counsel for the plaintiff adverted to the provisions of the bankrupt act, and suggested that he would draw up the required affidavits in respect to the solvency of Andrew J. Garvey, and on or about December twenty-second, he sent certain affidavits to the counsel for Mrs. Garvey, the defendant, to be sworn to by her and by John Garvey, to the effect that they were well acquainted with Andrew J. Garvey's affairs, and that they knew him to be solvent. At this time it was well known that the people of the State of New York had commenced an action against William M. Tweed, Andrew J. Garvey and others, to recover \$6,000,000, and that in this action an order of arrest, bailable in \$1,000,000, had been issued against the defendants, and it was currently reported that Garvey had fled the country to escape the service of these papers. The plaintiff claimed that if he took this title under these circumstances, that at any time within six months from the time of the conveyance from Andrew J. Garvey to his brother, this conveyance could be set aside by an assignee in bankruptcy in case Andrew J. Garvey should be declared insolvent, and thus the plaintiff's title be defeated, and that it was for this reason that he asked for these assurances of the solvency of Andrew J. Garvey. The parties, on the twenty-seventh of December, met at the office of defendant's counsel, and there it was stated by the plaintiff's counsel that they would not take the title without these affidavits, or some written assurance in reference to Andrew J. Garvey's solvency. The defendant refused to give the affidavits required, upon the ground that they were untrue, although John

Garvey stated that his brother was solvent. On the twenty-eighth of December the parties met, with a like result, the defendant pressing to have the title closed, and the plaintiff refusing to take the title, unless evidence, satisfactory to his counsel, was furnished of the solvency of Andrew J. Garvey. The parties met again on the twenty-ninth of December, and the plaintiff, still persisting in his demand for affidavits of Andrew J. Garvey's solvency, besides the assurance of John Garvey, was notified by the defendant's attorneys that unless the contract was closed the next day, it would be canceled. The parties met the next day; the defendant tendered a good and sufficient deed of the premises, which deed the plaintiff refused to receive, unless accompanied by satisfactory proofs of Andrew J. Garvey's solvency. The plaintiff tendered the purchase-money, demanding the deed and proofs of solvency, but would not pay the money upon the delivery of the deed alone. The defendant, upon the refusal of the plaintiff to take the deed, declared the contract canceled, pursuant to its terms, and subsequently tendered back the \$500 paid thereunder. This was on Saturday, the thirtieth of December, and on the fourth day of January following, this action for a specific performance was commenced by the service of the summons and complaint; and the relief asked was that the defendant be ordered and adjudged to furnish satisfactory proof of the solvency of Andrew J. Garvey, and that she execute and deliver a valid conveyance, etc.

John W. Edmonds, A. J. Dittenhoefer, Runkle & Englehart,
for the appellant.

Luther R. Marsh and Gilbert & Smedley, for the respondent.

DAVIS, P. J. :

This case was carefully tried by the learned judge at Special Term, and his findings of fact and conclusions of law, as well as the reasons expressed in his able and elaborate opinion, seem to us to be equitable and just.

In suits of this character there can be no fixed and arbitrary rule by which all cases are to be determined. Each case must depend and be disposed of upon its own circumstances. When and under

what circumstances time is or is not of the essence of the contract, are questions which have received so much and such elaborate discussion, that an attempt to shed further light upon them is quite likely to result in an effort "to darken counsel." (*Delavan v. Duncan*, 49 N. Y., 485; *Hubbell v. Von Schoening*, id., 326; *Finch v. Parker*, id., 1; *Duffy v. O'Donovan*, 46 id., 223; *Peters v. Delaplaine*, 49 id., 362; *Myers v. De Mier*, 52 id., 647; *Merchants' Bank v. Thomson*, 55 id., 7.)

Within the established rules of equity we think time was not of the essence of the contract between the parties to this action at the time the same was made and delivered. It was however *material*, and especially so to the vendor, who was anxious to realize the consideration for the purpose of meeting pressing debts. The time for performance was fixed for an early day. It was for that reason that so trifling a sum as \$500 was accepted as the payment down; and the parties took particular and unusual pains to provide for a rescission of the contract and the return of the \$500, "in case the title to the premises is defective, or in case the party of the first part shall be unable to give at the time [mentioned in the contract] a good and sufficient title to the premises;" and, also, to stipulate for the same consequence, "in case any legal proceedings in the nature of an attachment, injunction or otherwise, shall, in any manner, prevent the said party of the first part from conveying or making title to the said property, or shall incumber the title thereof."

The parties thus stipulated in substance for the consequence of an actual condition of things, *in presenti*, affecting the title of the lands, the fear of which, as a possibility *in futuro*, led the vendee to refuse to perform the contract on his part.

It might well be claimed that if the plaintiff regarded the title as defective by reason of the contingencies which he feared and asserted, and which arose without any fault of defendant, his taking that ground and refusing to perform, except upon the conditions he imposed, would give defendant the right, by the terms of the contract, to rescind and return the money paid.

It appears that the parties met from time to time; that the defendant was ready with her deed, and tendered performance on payment of the consideration; that the plaintiff made it an express

condition of his performance, that the defendant and her agent should each make an affidavit in relation to the solvency of the defendant's husband and grantor, the extent of his indebtedness, and the amount of his property over and above his debts, which they refused to make, and could not, as they assert, with truth, have made; and finally, that at the last meeting the defendant gave notice that if the deed was not then accepted and the money paid, she should regard the contract as at an end, and tender back the \$500, and rescind the agreement. The plaintiff refused to accept the deed, persisting in his demand for the affidavits, and thereupon the defendant offered back the \$500, and declared the contract at an end.

We think the plaintiff had no right to impose the condition of making the affidavits on the defendant and her agent, and that his doing so was equivalent on his part to denouncing the title as defective, and thereby giving to defendant the right of rescission as stipulated for in the agreement. But if this be not so, the plaintiff had, in our judgment, no right to impose such a condition, and, on refusal of defendant to comply with it, to resort to a court of equity to enforce the contract with the condition, or if he failed in the latter, to enforce specific performance of the contract itself. To allow purchasers of real estate to make such or similar conditions, and to speculate upon the chances of enforcing them by suit in equity, and all the while preserve the right to enforce specific performance of the agreement without the conditions, would not only open a new branch of equity jurisdiction, but operate to give an undue advantage to one party to such contracts, and render the rights of the other uncertain and subject to the caprice or necessities of the vendee.

We think the judgment should be affirmed, with costs.

DANIELS and BRADY, JJ., concurred.

Judgment affirmed.

JAMES BURKE, PLAINTIFF IN ERROR, v. THE PEOPLE OF
THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

Mayhem — Premeditation — Evidence of statements of complainant as to his fear of assault from prisoner.

In order to bring an act within the fourth class mentioned in the statute relative to mayhem, *i. e.*, to "cut off or disable any limb or member," the cutting or disabling must be done on purpose, and not be the result merely of an unexpected, instantaneous encounter, or of the heat of sudden passion, or of the excitement produced by the fear of bodily harm.

In a prosecution for mayhem, it is error to allow the statement, made by the complainant to a third party, in the absence of the prisoner, that he was afraid the prisoner would return and assault him, to be given in evidence, when there is nothing in the case going to justify such apprehension.

People v. McMahon (2 Parker, 668) followed.

APPEAL from the General Sessions, on conviction for maiming.

The plaintiff in error was convicted in the Court of General Sessions of the city of New York, on the 15th day of December, 1874, before Hon. JOHN K. HACKETT, recorder, and a jury, of the crime of mayhem, and was sentenced to imprisonment in the State prison for the term of fifteen years.

The indictment charged that, on the 24th day of November, 1874, the plaintiff in error did feloniously bite off a piece of the left ear, and disable a member of one James McLaughlin, and that he did feloniously and on purpose maim him, against the form of the statute, etc.

Peter Mitchell, for the plaintiff in error. The offense of which the defendant stands convicted, is not mayhem, as contemplated by the statute; he is not brought within the provisions of the statute, either by the indictment or proof. (See *People v. Allen*, 5 Denio, 76; *Wood v. The People*, 53 N. Y., 511.) Such statutes are to reach no further in meaning than their words. (Bishop on Statutory Crimes, §§ 194, 196, and authorities cited in notes.) The biting off of the outer edge of the fleshy part of the ear, in this case, was neither maiming nor disabling within the provisions of the statute. (See *State v. Abram*, 10 Ala., 128.)

B. K. Phelps, for the defendants in error. There was no error in denying the motion to strike out the testimony as to what McLaugh-

lin said about Burke's coming into the store. The statements were a part of the *res gestæ*. The testimony having been admitted without objection, there was no obligation on the part of the court to strike it out. (*People v. McMahon*, 2 Parker, 663.) It was at most entirely discretionary with the court. The offense of maiming may be committed without removing the whole of the limb or member "cut off or disabled." If a permanent injury is inflicted upon the member, it is disabled. (Bishop on Stat. Crimes, § 316, and note; 2 Bishop on Crim. Law, § 1007.)

BRADY, J. :

The injury inflicted upon the complainant is described by the physician who attended him, thus: "The wound was merely the outer edge of the left ear; it was pulled off from there right down to the lower lobe of the ear; it was merely the outer edge, just reaching as far as the cartilage — a simple, clean wound." "This cut was one-eighth of an inch deep all the way round." The circumstances under which the wound was made were these: The complainant and the prisoner had been together, drinking and disputing, but had not come to blows. They separated, the complainant going to a saloon, and the prisoner elsewhere. The complainant, from some fancy that the prisoner would return and assault him, tried to borrow a pistol, and then an ice pick, but getting neither, he took a poker and kept it. The prisoner finally came into the saloon, and presently went up to the complainant, taking hold of the lappel of his coat. It was, it would seem, a social approach. It is apparent that it was not a hostile demonstration — at all events, from the testimony given. The complainant was very much intoxicated then, and there is no doubt that the prisoner was drunk. While in this position, something was said by the prisoner, which is not revealed, and the complainant thereupon struck at him with the poker. They clinched, and the prisoner bit his ear. It would seem, from the evidence of the physician, that he must have seized the outer edge with his teeth, and torn off that part of the complainant's ear, unless, indeed, the complainant tore it off in his efforts to free himself. The complainant did not know at the time that his ear was bitten, and could not say that the prisoner did it. He had, as he stated, another matter with a man before his collision

with the prisoner. He also admitted that he was a quarrelsome man when in liquor.

Upon the trial, the district attorney asked the bar-tender of the saloon the following question: "Do you remember what McLaughlin said about Burke's coming into the store?" and he answered, "Yes, sir; he told me, when I wanted him to go and sit down and go to sleep, that he was afraid Burke would come in and beat him. I said 'nobody will beat you; sit down and go and take a sleep.'" The counsel for the prisoner moved to strike out this answer, upon the ground that he did not hear the question put to the witness, and because of its incompetency. The application was refused, and exception was taken to such ruling. There is no doubt, it should be said here, that the injury received by the complainant was the result of a drunken brawl, and none that it was not inflicted by premeditation — *by lying in wait* for the purpose. The collision which occasioned it was one really begun by the complainant, who, as already stated, on some observation being made, struck at the prisoner with a poker. During their wanderings earlier in the day, they had wordy disputes, as the complainant said, but the prisoner had neither struck him nor threatened to strike him, and the case presents no evidence which warrants the conclusion that he designed to do him any harm other than taking hold of the lappels of his coat, which, as already suggested, was apparently a social and not a hostile action.

The statute under which the prisoner was convicted is as follows: "Every person who, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intention to kill or commit any felony, shall,

1. Cut out or disable the tongue; or,
2. Put out an eye; or,
3. Slit the lip, or destroy the nose; or,
4. Cut off or disable any limb or member

Of another, on purpose, upon conviction thereof, shall be imprisoned in a State prison for such term as the court shall prescribe, not less than seven years." (2 Edmonds' Statutes at Large, 683, 684.)

The court was asked to charge the jury that the fact of lying in wait was not made out by the prosecution, and the court declined so to charge, to which exception was duly taken. The court was also

asked to charge that the jury could find a verdict of assault and battery. This request was granted, but coupled with a statement that the jury could find a verdict of arson, or anything they liked; that they had the physical power to do so, but they should hold themselves responsible to their oath and intelligence to decide according to evidence and the law. The court was also requested to charge the jury that the offense committed was not mayhem, as contemplated by the statute, and the proposition evidently rested upon the fact that a portion of the ear only was destroyed. The court, in answer to this request, said: "The mere fact that the ear was partially taken off—that that should constitute no offense—that the ear should be perfectly destroyed, I shall leave to the jury to say whether any disability was attached to this ear. The ear is a member of the human face. It is a component part of a man's countenance. It is not denominated by the statute. It would be an absurdity to say that the statute limits the application to the entire destruction of this member. In order to provide for that difficulty, the statute says, if any person shall 'cut off or disable any limb or member.' It is a question for the jury to say whether this ear was bit off by this man, and whether there was any disability to the ear from this partial destruction. I shall leave that to them. If they shall so decide, I shall instruct them to convict this man of the charge." The prisoner's counsel excepted to this ruling.

Upon the exceptions thus stated the appeal in this matter depends. In reference to the first, it may be said that the statement of the complainant before the occurrence, when the prisoner was not present, was not admissible. It is not necessary to cite authorities for a rule so well established by the law of evidence. The testimony was admitted without objection, it is true, but that arose from the failure of the prisoner's counsel to hear the question, if we are to believe his declaration in open court, and which was not questioned. The statement was injurious to the defense of the prisoner, because he claimed to have acted in self-protection; and the effect of it was to make the prisoner the aggressor, and to put the complainant in fear of bodily harm, thus justifying his resort to the poker when he could get neither pistol nor ice-pick, when, on his own testimony, there was nothing from which he was author-

ized to draw the conclusion that the prisoner meant to assail him in such way as to put him in any jeopardy. In the exercise of a sound discretion, the testimony should have been stricken out. It was entirely incompetent. (See *People v. McMahon*, 2 Park., 663.)

In reference to the second exception, it is clear, beyond all doubt, that the prosecution did not make out the fact of lying in wait, contemplated by the statute. The intention of the prisoner to do what he did, was not evinced by lying in wait for the purpose, according to the testimony, and he was entitled to the benefit of the request made. The refusal to charge as requested was error therefore. It may be that it was not necessary to prove that fact; indeed, it is quite apparent that it was not because the premeditation might be shown "in any other manner," but the prisoner's case was to be determined by the "other manner" when it was not shown that he was lying in wait. The jury could not assume that he was, when the evidence did not warrant it; and the absence of proof of a material fact like that, was a feature in the prosecution to which the prisoner was clearly entitled.

In reference to the third exception, it must be said that there was no evidence that the ear was disabled. The physician did not so state. Its perfection, as an organ of the human frame, was destroyed, but its usefulness for the purpose for which it was designed, was not at all affected, if this case is to be disposed of on the evidence. There was no distinct exception to this part of the answer of the court, given to the request in relation to the necessity of showing the entire destruction of the ear, but the exception was to the ruling upon the request, and it was part of the ruling that it should be left to the jury to say whether any disability was attached to the ear. In this, under the evidence, the learned recorder was in error. The disability was not for their speculation or conjecture, but to be considered and disposed of on the evidence. Whether the offense of which the prisoner stood charged, was within the statute to which reference has been made, it may not be necessary here to decide; because, assuming it to be, the exceptions taken are such as to require a new trial; but it is proper to say that it comes, if at all, within the statute, certainly and only within the fourth class, namely, "to cut off or disable any limb or member;" and to

bring it within that class, the cutting or disabling must be done *on purpose*, that is, with premeditation. It must be designedly done. It must be the intention to do it; otherwise it is not done on purpose; and, it seems to me, must not be, under a proper interpretation of the statute, the result of an unexpected, instantaneous encounter, or of the heat of sudden passion, or of the excitement produced by the fear of bodily harm. The violent intentional disfigurement of the ear is an offense which should be punished, and doubtless with severity; and it may be that such an act would be a felony within the provisions of the statute mentioned, although the legislature has not so expressly declared. It reads, "to cut off or disable." It is not mayhem at common law to cut off an ear. It is not, by the principles of that system, regarded as rendering a man less competent to attack his adversary or to defend himself. (Barb. Crim. Pr., 81; 4 Black. Com., 205; Ros. Cr. Ev., 654 [ed. 1836]; 1 East P. C., 393; *State v. Marns*, 1 Cox, 453; *Comm. v. Newell*, 7 Mass., 245.) We think, however, that upon the exceptions discussed, the prisoner is entitled to a new trial. We arrive at this conclusion the more readily, because we think that the observations which accompanied the charge that the jury might find a verdict of assault and battery, were such as in effect to modify the charge on that subject, or destroy its benefit to the prisoner, and thus leave the jury to infer that such a verdict would be at variance with their intelligence and the evidence and the law. It was not so intended, doubtless, and perhaps there may be some inaccuracy in the report of the language used, but we find it in the case, and feel it our duty to allude to it.

Judgment reversed and a new trial ordered.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed, and new trial ordered.

THE MAYOR, ETC., OF THE CITY OF NEW YORK,
RESPONDENT, v. HENRY W. GENET, APPELLANT.4 487.
69 310.

*Code, § 229 — affidavit for attachment — when it sufficiently shows non-residence —
Domicile and residence — distinction between.*

Upon an application for an attachment on the ground of the non-residence of the defendant, the affidavit is not required to state in positive terms that he is not a resident of the State. It is sufficient when that conclusion is the only one which can be consistently drawn from the facts set forth in the affidavit.

Domicile is the habitation fixed in any place with the intention of always staying there, while residence is much more temporary in its character.

Where, on an application for an attachment, an affidavit was presented showing that the defendant had been indicted and convicted of obtaining, by false pretenses, the money to recover which the suit was brought; that after conviction and before sentence he escaped, and, though the most strenuous efforts had been made to discover his whereabouts, he still continued concealed: *held*, that it sufficiently appeared that he was a non-resident, and that an attachment was properly issued. (DAVIS, P. J., dissenting.)

APPEAL from an order denying a motion to vacate an attachment. The motion was made solely upon the affidavit upon which the warrant was granted.

Oliver W. West, for the appellant.

John E. Parsons, for the respondent.

DANIELS, J. :

The Code allows an attachment to be issued against the debtor's property in an action on contract for the recovery of money, whenever it shall appear by the affidavit on which the application may be made, that a cause of action exists, and the defendant is not a resident of the State. The affidavit is not required to state in positive terms that he is not a resident of the State; it is sufficient that the fact appears by the affidavit (Code, § 229); and that may as clearly be the case, when the conclusion is the only consistent one which can be drawn from the facts set forth in it, as it would be from a positive statement of the fact itself. What the law requires is, that the fact shall appear by the affidavit produced

on the creditor's behalf; and it does so appear whenever the circumstances set forth are consistent with no other rational conclusion.

The affidavit in this case, although very imperfectly and inartistically drawn, shows that the defendant was tried and convicted, in December, 1873, of the offense of obtaining a portion of the money sued for, by means of false pretenses; that, shortly after his conviction, and before the time fixed for him to receive sentence, he escaped from the custody of the sheriff of the city and county of New York and absconded; and, though the most strenuous efforts have since been made to discover his whereabouts, he still continues concealed. The defendant had been convicted of a grave crime about three months before the attachment was issued, and, to avoid sentence and punishment, escaped from the officer having him in custody, and has ever since remained a fugitive from justice, successfully eluding the efforts of the officers to discover his place of concealment.

The plain and reasonable inference indicated and supported by these circumstances, is, that he at once left the State, in order to place himself beyond the control and power of its officers. Safety could be secured in no other manner; and that being the defendant's object, he would be inclined to attain it in that way, and as expeditiously as circumstances would permit. The supposition that he could remain within the State and be discovered by no one, is incredible, in view of the exertions made to find him. The natural impulse prompting his flight would be at once to place himself out of its limits, and that he must be presumed to have done as soon as circumstances allowed it to be accomplished. And, for the same reasons, it cannot be plausibly supposed that he has ever, since then, returned within its borders. From the time of his escape from the officers, it is to be presumed he has been a fugitive in some foreign State, for that alone could furnish him the security sought by him against their vigilance and efforts to recapture him. And it is not to be supposed that his absence from the State is intended to be voluntarily abridged. The motive that led to his flight will induce him to continue his residence abroad indefinitely, for in no other way can he protect himself from the punishment due to his crime.

These facts and conclusions, which appear by the affidavit on which the attachment was issued, are clearly sufficient to show that the defendant was not a resident of the State when the attachment was issued. The fact that his family may continue to reside within this State, and that his home or domicile may be here, is not enough, under the circumstances shown, to render him a resident of the State; for a person may have his home or domicile in this State, and be at the same time a resident of another; and, when that is the case, he is subject to the attachment laws as a non-resident debtor. The domicile is the habitation fixed in any place with an intention of always staying there, while simple residence is much more temporary in its character. These subjects were fully examined in the case of Thompson. (Reported in 1 Wend., 43.) His domicile seems to have been in this city. He left it partly on business and partly on pleasure, and remained away until an attachment was issued against him as a non-resident debtor. In delivering his opinion in that case SAVAGE, C. J., said: "It appears to me, the object of the statute was to authorize creditors to prosecute for their debts when their debtors were abroad; and whether their absence from this State is permanent or temporary, whether it is voluntary or involuntary, the reason for giving this remedy to the creditor is the same. * * * The question, I think, is, where was his actual *residence*, not his *domicile*. * * * The reason why this remedy is given against the property of debtors resident abroad, is equally applicable, whether the debtor is absent permanently or temporarily. No length of residence, without the intention of remaining, constitutes *domicile*. A debtor, therefore, by residing abroad, without declaring an intention to remain, might prevent his creditors from ever collecting their debts." (Id., 45, 46.) The same principle was applied to the case of a debtor who had been absent from this State, from May, 1836, to March, 1837, when he returned on a visit to his family and was arrested as a non-resident. Though his domicile was in this State, it was held, under the circumstances, that his residence was out of it, and for that reason his arrest was sustained. (*Frost v. Brisbin*, 19 Wend., 11.) And both these cases have since been approved by the Court of Appeals in *Haggart v. Morgan* (1 Seld., 423), where the property of the defendant was held liable to an

attachment as a non-resident of this State, upon a mere absence of three years in New Orleans, where he was necessarily detained in attendance upon a lawsuit. The attachment in the present case was issued under a similar provision of the law to those before the courts in the other cases, and it was properly allowed under the construction which they maintain. While it would have been more formal if the affidavit had in plain terms stated the fact of the defendant's non-residence, that was not indispensably requisite, as long as the circumstances disclosed pointed in the most unmistakable manner to that conclusion. The length of absence cannot be important when it appears, as it does in this case, to have been accompanied with a design of remaining beyond the limits of the State. When he left the State with that intention he became a non-resident, and liable to have his property seized by attachment.

It sufficiently appeared that a cause of action on contract for the recovery of money existed in the plaintiff's favor, although the precise amount of the demand was not clearly defined. The affidavit was hurriedly and most carelessly drawn. That is entirely apparent from its statements and the manner in which they were made. But the public interests should not be jeopardized by dismissing the proceedings in order to secure their correction, as long as the facts required for their support can be reasonably gathered from the affidavit produced.

The order should be affirmed, with ten dollars costs besides disbursements.

BRADY, J. :

Although it may be, that it does not appear that the defendant in this action fled from the jurisdiction of this court to avoid the service of civil process, it is not denied that he left for the purpose of preventing the consequences of his conviction for a criminal offense. The effect of such an act must be to deprive the person committing it of his character as a resident. He places himself designedly beyond the reach of the power of the State by leaving its territory, and in terror of its laws. The presumption arising from that circumstance, in reference at least to the exercise of jurisdiction over his property, is, that he does not intend to return. It is not susceptible of any other conclusion consistent with the object

and intent of his flight. He abandons deliberately his residence. It is an unqualified, unconditional act, and one which, as the decision of this court * and the Court of Appeals show, deprived him of the right to review on exceptions the trial by which he was convicted. When a man thus conducts himself, he waives acquired rights which depend upon his presence within the State, or circumstances which warrant its presumption, and is to be treated as if he were not present, and had no rights founded upon that legal attitude. He became, in other words, to all intents and purposes, for the enforcement of remedies, a non-resident of this State. I agree with Justice DANIELS that the order should be affirmed.

DAVIS, P. J. (dissenting) :

This motion was made upon the affidavit on which the attachment was granted. Assuming that the cause of action, and the grounds, and amount thereof, sufficiently appear by the affidavit, it is still fatally defective in other respects ; and it cannot be upheld without a departure from established rules and practice, greater than the court can be justified in making. Section 229 of the Code provides that a warrant of attachment may be issued when it shall appear by affidavit (amongst other things) that the defendant "*is not a resident of the State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.*" It is within one of these provisions that the affidavit is claimed to have brought the defendant. But as it is not asserted that he is not a resident of the State, it is essential that it should appear either that he has departed from the State with intent to defraud his creditors, or to avoid service of a summons, or that he keeps himself concealed within the State with like intent. The facts to be established are, either the departure from the State or the concealment therein with intent to defraud creditors, or to avoid service of summons ; and if a case is shown from which it appears that he has done one or the other of those things, it is not necessary clearly to establish which of them, for the application may be in the disjunctive and embrace all the alternatives of the section. (*Van Alstyne v. Erwine*, 11 N. Y., 331 ; *The People v. The Recorder of Albany*,

* See *Matter of Genet*, 1 Hun, 292 — [REP.].

6 Hill, 429; *Morgan v. Avery*, 7 Barb., 656.) In *Van Alstyne v. Erwine*, the court say: "The remedy is precisely the same, whether the debtor had absconded or was concealed; no difference whatever existing in the proceeding in the two cases. A case may be so circumstanced that, although it may be conclusively shown that the debtor has left his place of residence in order to defraud his creditors by depriving them of their remedies, yet it may be impossible even to conjecture whether he has continued his flight beyond the boundaries of the State, or has resorted to some place of concealment in it. * * * If the objection is well founded, there could be no proceeding under this statute in a case thus circumstanced. The debtor would have only so to conduct his evasion as to make it uncertain which course he had adopted, and he would avoid this remedy." And again the court say: "The same considerations apply to the other alternative—whether the debtor's intent was a general one to defraud his creditors, or whether it was to avoid the service of civil process." That case, as well as the case in 6 Hill, arose under the Revised Statutes, but the provision of the statutes is so nearly identical in language with that of the Code, that no possible reason can be assigned for a different construction. It follows, therefore, that the intent of the debtor may be stated in the alternative, and so may the departure or the concealment, but the facts stated by the affidavit must be such as to show that one or the other of each set of alternatives exists; that is, a departure from the State or a concealment within it, and an intent to defraud creditors or to avoid service of summons. The intent to defraud creditors or to avoid service of summons, is a question of fact to be established to the satisfaction of the judge, and it has been more than intimated that the affidavit should assert the intent either positively or as matter of belief. (*Miller v. Brinkerhoff*, 4 Denio, 120; *Genin v. Tompkins*, 12 Barb., 265.) Undoubtedly that is the better practice, and should always be adopted; but as neither the most positive assertion of the affiant, nor the statement of his belief, is sufficient without setting forth facts upon which the judge can legally find its truth, it would seem to follow upon sound principles, that the statement of facts which show the intent so that the judge can be legally satisfied of its existence, ought to be held enough. (*Ex parte Robinson*, 21 Wend., 672.) The affidavit

in this case is barren of any assertion, either positively or on information or belief, that the defendant had departed the State with intent to defraud creditors, or to avoid service of summons, or that he keeps himself concealed therein with intent to do either of those things. Assuming that statement not in strictness to be necessary, the question becomes: Has the affiant stated facts, from which the judge who granted the warrant could lawfully be satisfied that one or the other intent existed, and that defendant had departed the State, or concealed himself within it, to effectuate such intent? All that can be found in the affidavit bearing on the subject, may be briefly stated: First, in the statement tending to show that the indebtedness for which the action was brought, is for moneys fraudulently obtained by defendant, and wrongfully applied to his own use; second, that an indictment for obtaining a portion of the moneys, had been tried in December, 1873, and the defendant had been convicted by the jury; third, that "shortly after his conviction, and before the time fixed for him to receive sentence, he escaped from the custody of the sheriff of the city and county of New York and absconded, and that, though the most strenuous efforts have since been made to discover his whereabouts, he still continues concealed." These statements failed to show whether the defendant had departed from the State, or had concealed himself therein, but they did establish that he had escaped from the custody of the sheriff, and had concealed himself either within the State or elsewhere. They were quite enough to answer one or both of the alternatives of the Code, as to the mere fact of departure from the State, or concealment within it. But did they establish the intent to defraud creditors, as required by the Code, or some other intent — the intent to avoid service of summons, or some other process? In my opinion they show an intent, by flight and concealment, to avoid sentence and punishment under the conviction of crime, and fail to show an intent to defraud creditors, or to avoid the service of civil process.

In *Lynde v. Montgomery* (15 Wend., 461), it was held not sufficient to sustain an attachment, to show that the defendant had concealed himself to avoid service of *criminal process*. That case arose upon the statute which allowed attachments to issue from justices' courts, where it was made to appear that the defendant

had kept himself concealed "with the intent to avoid service of civil process." (2 R. S., 230, § 26.) And the court, holding that the process described in the affidavit was a criminal one, held the attachment invalid, saying: "To sustain the attachment it should have appeared *affirmatively* that the process was a civil process." (*Evans v. Saul*, 8 Martin [N. S.], [La.], 247; *People v. O'Brien*, 6 Abb. [N. S.], 63, 68; 2 Wait's Pr., 138.) The analogy between the statutes is complete, for the summons mentioned in section 229 of the Code, is clearly the civil process provided for the commencement of actions under the Code.

It is no argument to say that the defendant's departure and concealment were with intent to avoid punishment for crime, and therefore creditors ought in such a case to have the process of attachment. Perhaps so; but the Code has not given it, except in the specified cases, and to add another, is to legislate, which is not the province of the court. It is easy to see that other facts (if they exist) might have been added, which would tend to show that the escape and concealment involved the element of intent to defraud creditors, or avoid service of process, such as the disposing of, or incumbering or attempting to remove property; the failure to meet or provide for debts; the neglect to put any one in charge of property or business left behind; and a variety of incidents of that nature, from which it might be justly inferred that an intent to defraud creditors was coupled with a design to evade punishment of crime; for very clearly, where both exist, the right to the warrant of attachment would not be prejudiced by the fact that the defendant was also evading criminal punishment. With all reasonable desire to uphold the attachment in this case, I find myself constrained to the conclusion that it cannot lawfully be done. My brethren are, however, of opinion that the facts are sufficient to establish that defendant is a *non-resident* of the State, and that the attachment should be held valid on that ground. I cannot agree to that conclusion. The warrant was not sought or granted on that ground. There is no assertion of non-residence. The defendant is a fugitive from justice, and the idea of non-residence is based altogether upon a supposed presumption that he has fled to a foreign country or State, and there remains because he would be safer there from the vigilance of the officers from whom he escaped, than in this State.

I am not able to see that such a presumption exists. If official vigilance has been no greater since than at the time of the escape, a presumption based upon it has small ground to stand upon. But the State is large enough to furnish numerous places of concealment, and even the city itself has harbors of refuge, in which criminals may be safe from the search of those who seek diligently *not to find*. In my judgment the facts alleged in the affidavits fail to show *non-residence* as required by the Code, which is, I think, a fact to be *distinctly asserted and affirmatively proved*.

I cannot concur in the affirmance of the order:

Order affirmed, with ten dollars costs and disbursements.

IN THE MATTER OF THE PETITION OF DANIEL P. INGRAHAM,
TO VACATE AN ASSESSMENT ON EIGHTY-EIGHTH AND NINETY-
FIRST STREETS.

Streets — dedication and acceptance — right to assess lots fronting on — rights of the corporation of New York in land dedicated for the uses of a street.

In 1849 the petitioner conveyed certain lots, on the north side of Ninety-first street, as laid down on a map of the city of New York, reserving a right of way through said street, which had never been opened by the city, for the owners of other lots; the street was subsequently used by the general public as a highway for the passage of vehicles of various kinds, and for foot passengers; gas and water pipes were laid in it, and for several years it had been lighted with gas. *Held*, that these acts constituted a dedication of the land to the use of the public as a street, and an acceptance thereof by the public.

When a street is thus created, it necessarily becomes subject to the acknowledged power of the authorities to regulate, grade and improve it, and this right is necessarily accompanied by the further right to impose upon the adjoining land the expenses of such acts as may be done in the proper exercise of any of these powers.

APPEAL from an order made at Special Term, denying the application of the petitioner to vacate an assessment for a sewer on Eighty-eighth street and on Ninety-first street, in the city of New York.

The corporation laid a sewer in Ninety-first street, extending from Fourth to Second avenues. Another sewer was constructed

in Eighty-eighth street, between Second and Third avenues. These two sewers were embraced in one contract; and a single assessment, embracing both sewers, was laid, covering all the property in the sewerage district within which the sewers were located. The petitioner claims to vacate the assessment, on the ground that the corporation had no right to lay the sewer in said street, or to make an assessment therefor; and also on the ground that, assuming they had the right to lay the sewers and make the assessment, they had no right to embrace the two sewers in one assessment, and to assess on the petitioner's property any portion of the expenses of the Eighty-eighth street sewer, which can, under no circumstances, be beneficial to it. The court below denied the application, on the ground that there was a dedication.

J. E. Burrill, for the petitioner. The assessment was invalid, because the corporation never acquired the title to the land forming Ninety-first street, through the center of which the sewer is laid, as there has been no dedication of the land to the corporation of the city of New York. The fact that the petitioner, in making the conveyance to Fanshaw and others, bounded these premises by the middle of Ninety-first street, and in leaving the land unfenced, undoubtedly estopped the petitioner, and those deriving title from him, from closing the streets, and conferred on his grantees the right to have the street kept open for the purpose of passage; but this did not make them public streets, nor confer a right on the corporation or any one to take the land, or to use it, except for the purpose of passage. (*City of Oswego v. Oswego Canal Co.*, 6 N. Y., 262; *Underwood v. Stuyvesant*, 19 Johns., 186; *Fonda v. Borst*, 2 Keyes, 48; *Kelsey v. King*, 33 How. Pr., 39; *Livingston v. The Mayor*, 8 Wend., 99; *Badeau v. Mead*, 14 Barb., 338; *Bissell v. N. Y. C. R. R. Co.*, 23 N. Y., 67.) Even if there had been such a dedication as claimed, still, until the corporation should acquire the title to the land, no one had a right to use it except for the purpose of passage, and the use for any other purpose was a trespass. (*Kelsey v. King*, 33 How. Pr., 39.) It is very clear that if the act of the corporation, in laying the sewer, was without right or authority, there was "substantial error" in levying the assessment within the act of 1858, as amended. (*Matter of Sharp* 1 N. Y.

S. C. [T. & C], 127; *In re Babcock*, 23 How. Pr., 118; *In re Buhler*, 19 id., 317; *In re Beamis*, 17 id., 460.) The assessment was invalid, because the assessment upon the petitioner's land embraced the expenses of the sewer in Eighty-eighth street, which is wholly disconnected from the sewer in Ninety-first street.

E. Delafield Smith and *T. B. Clarkson*, for the respondent. The fact that the sewer was laid in private property is not a "fraud or substantial error" in the "proceedings relative to an assessment" for the cost of the sewer, for which alone the statute of 1858, as amended, affords relief. (12 Abb., 121, 124; 14 id., 53, *Hay's case*.) An omission or irregularity in one or more of these statutory steps "would be a legal irregularity within the act of 1858." (23 Abb., 118.) The facts proved show a dedication of the street by those owning the fee to the public use. The uses of it by the general public is an acceptance. And if that is not enough, the laying of water pipes in the street and lighting it with gas, is an acceptance by the authorities, a dedication and acceptance for *all the purposes for which* streets in New York are used. (*Holdane v. Trustees of Cold Spring*, 21 N. Y., 474; *Bissell v. N. Y. C. R. R.* 23 id., 61, 64, 65; 11 Wend., 486; 1 Hill, 189; 19 Wend., 128; 1 Hill, 191.)

BRADY, J. :

It appears that the petitioner and wife, by deed dated February 1, 1849, duly recorded, conveyed to Daniel Fanshaw eight lots of land, bounded north-easterly by the central lines of Ninetieth and Ninety-first streets, subject to a right of way over the portion of Ninety-first street thereby conveyed to G. Rollins, his heirs and assigns, to lots lying north-westerly of the premises. It also appears that Ninety-first street, between Third and Lexington avenues, has been used by the general public as a highway and thoroughfare for the passage of vehicles of various descriptions, horses and cattle and foot passengers; that dwelling-houses have been erected on the southerly side of said street; that several years ago, pipes for croton water were laid in the street; also, that pipes for gas have been laid, and that the street for several years has been lighted with gas. The petitioner alleges that the water and gas pipes were put

in, however, without his knowledge or consent; but this cannot change the legal effect of the facts stated. The map upon which Ninety-first street had been laid down, had been filed, and the petitioner was aware of that fact and the locality of the street, when the conveyance made by him was executed. This grant was bounded by the street, and that act was, according to the adjudications in this State, a dedication of the adjoining land in the cite of the street. It was an adoption of the map (*Matter of Thirty-second Street*, 19 Wend., 128; *Matter of Thirty-ninth Street*, 1 Hill, 191; *Wyman v. The Mayor*, 11 Wend., 487; *Post v. Pearsall*, 22 id., 425; *People v. the City of Brooklyn*, 48 Barb., 211); and an allowance for value to the owner of the grant on opening the street by proceedings therefor, would be improper. Nothing but nominal damages, because of the grant, could be given. (Id.) The principle applied in these cases is well established, and has been recognized in subsequent decisions. The street has not been opened, it is true, by any proceeding for that purpose under the statutes relating thereto, but the laying of croton pipes and gas pipes, and the use of gas to light the street, furnish unmistakable evidence of an intention on the part of the authorities to accept, adopt and use the street as laid out and dedicated, and this acceptance has been confirmed in the use of the street by the public generally and for many years as a highway. It is not necessary that there should be a formal act of acceptance or adoption of the street by the public authorities. It may be done by acts *in pais*. A common user under circumstances showing a clear intent to accept and enjoy it as such, is sufficient (*Holdane v. Trustees of the Village of Cold Spring*, 21 N. Y., 474; *Bissell v. N. Y. Central R. R. Co.*, 23 id., 64, 65; *In the Matter of Thirty-second Street*, *supra*, 434; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 412; *In the Matter of Thirty-ninth Street*, *supra*; *Estate and Rights of the Corp.*, by Hoffman, vol. 1, pp. 342, 343); and this would be so, even if the street were not laid out by the authorities, but by the owners of the adjoining land. (Decisions *supra*.) The cases of *Underwood v. Stuyvesant* (19 Johns., 186); *The City of Oswego v. The Oswego Canal Co.* (6 N. Y., 257), and *Fonda v. Borst* (2 Keyes, 48), on which the petitioner in part relied, all affirm the proposition, that no formal opening is necessary to establish a street, if it can be done inferentially by user. When it

is thus established, the adjoining owners become subject to the same burdens in reference to improvements, which may be imposed when the street is opened by formal proceedings therefor. We were not referred on the argument to any case maintaining or asserting the opposite doctrine, and after diligent search none has been found. If a street may be established by dedication, adoption and user, it would seem to be unnecessary for the city, except for the purpose of acquiring the fee in the land in the street, to resort to proceedings under the act of 1813. When the street is created it becomes necessarily subject to the acknowledged power of the authorities to regulate, grade and improve it, and generally subject to their control; and the right thus to treat it is necessarily accompanied by the further right to impose upon the adjoining land the expenses of such acts as may be done in the proper exercise of any of these powers. It may also be said in confirmation of these views, although it is not necessary herein so to decide, that the adoption of the street in the manner stated, leaves little doubt of the liability of the city for injuries which might be occasioned by its failure to discharge the duty of keeping it in proper condition for safe use at all times. The street having been thus opened and appropriated to the public by adoption and user, the petitioner's property became subject to the assessments for improvements to which lots on streets and highways opened by formal proceedings are exposed. If this be not so, then the doctrine of dedication is one of words only, and not of substance. If there be a street, it is at once subject to the dominion of the authorities. It follows, therefore, that unless there is some substantial error shown, rendering a different course necessary, the order made at Special Term must be affirmed.

It is also objected that two sewers were included in the contract, but it appears that they were built according to the plan adopted for sewerage in the district in which they were placed. This mode of procedure could be lawfully employed under the act of 1865 (Laws of 1865, chap. 381, § 5), and the expense of the whole assessed on the lots on each street in proportion to their frontage on each street, which was done here, each lot of twenty-five feet being assessed for the same amount. It also appears that the petitioner was not aggrieved by the assessment imposed. The answer

made by the authorities on that subject is as follows : The evidence introduced in opposition to the petition, shows the amounts of each of the various kinds of work done in each street, and the contract, and the contract-price therefor ; and the following calculation shows the cost of the work done in each street : Eighty-eighth street, between Second and Third avenues, 555 feet sewer, built at $\$5.25 = \$2,913.75$; 1,371 yards of rock blasted, at $\$4 = \$5,484 = \$8,397.75$; Ninety-first street, between Second and Fourth avenues, 1,566 feet sewer built, at $\$5.25 = \$8,221.50$; 3,271 yards rock blasted, at $\$4 = \$13,084$; 720 yards rock removed without blast, at $\$5 = \$3,600 = \$24,905.50$. This shows the cost of the sewer per foot, in Eighty-eighth street, to have been $\$15.13$, while the cost of that in Ninety-first street was $\$15.90$ per foot. The petitioner is therefore assessed less than he would have been if the sewer in Eighty-eighth street had not been included in the assessment. In other words, if there is any grievance, it is that property on Eighty-eighth street has been assessed for the sewer on Ninety-first street, not property on Ninety-first street assessed for the sewer in Eighty-eighth street, and the petitioner is not aggrieved, but benefited, by the joinder of the two sewers in one assessment. Instead of his being assessed for a sewer from which he receives no benefit, he is actually benefited by the Eighty-eighth street sewer being included in the same assessment with the Ninety-first street sewer ; and this answer seems to be conclusive, under section 1 of the act of 1858. (Laws 1858, p. 574.) The party aggrieved may apply. The petitioner appears to have been benefited by the union of the two assessments, and cannot complain therefore if his property be subject at all to the assessments.

The order made at Special Term must, for these reasons, be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed with ten dollars costs, besides disbursements.

IN THE MATTER OF THE PETITION OF FANNY LEVY TO VACATE
AN ASSESSMENT FOR PAVING FORTIETH STREET, BETWEEN THIRD
AND MADISON AVENUES.

*Chap. 187, of 1870, § 20—publication required by—when it must be made—effect
of an omission to make it.*

Under chapter 187, of 1870, requiring the publication of certain ordinances and resolutions passed by the board of aldermen and assistant aldermen of New York, publication must be made of the resolution introduced or passed in the respective boards, and cannot be made before that time. It is not notice of the intention to introduce or pass it, but the fact that it has been introduced or passed which is to be published.

APPEAL from an order made at the Special Term, vacating an assessment for the repairing of Fortieth street, between Third and Madison avenues, in the city of New York.

The resolution for the work was introduced into the board of aldermen January 9th, 1871; adopted March eleventh; introduced into board of assistant aldermen, April twenty-fourth, and adopted April twenty-seventh. It was proved that the resolution was not published after its introduction and before its passage, as required by law, but the counsel for the corporation claimed that such publication could be made at any time after its passage in the board of aldermen and before its passage in the board of assistant aldermen.

E. D. Smith and *Wm. Barnes*, for the corporation, appellant.

Neville & Andrews, for the petitioner, respondent.

BRADY, J. :

The statute of 1870 (Laws of 1870, p. 369, § 20), requires the publication of each ordinance or resolution which shall be passed or introduced in the respective boards, and it declares that no vote shall be taken in either board upon the passage of an ordinance or resolution, which shall contemplate any specific improvement, or involve the sale, disposition, or appropriation of public property, or the expenditure of public moneys or income therefrom, or lay any tax or assessment, until after such notice shall have been pub-

lished three days. For the purposes of this appeal, it is not necessary to recite the rest of the section. (Sec. 20.) It clearly appears, in this matter, that no publication of the resolution involved in these proceedings, introduced and passed in the board of assistant aldermen, was made in any one of the papers designated by the common council, either under the acts of 1868, 1870 or 1871. (Laws of 1868, p. 2007 ; Laws of 1870, p. 882 ; Laws of 1871, p. 1231.) The resolution was introduced in the board of assistant aldermen on the 24th of April, 1871, and adopted April 27th, 1871. The papers designated at this time were *The Democrat*, *The Leader*, *The Citizen* and *The Atlas*. It was not published in any one of these papers. The *Transcript*, another paper, was not designated until the 25th of April, 1871, and could not have contained the resolution in time. The publication must be made of the resolution introduced or passed in the respective boards, and cannot be made before that time. It is not notice of the intention or design to introduce or pass it, but the fact that it has been introduced or passed, which is to be published ; and, although the introduction or passage of a resolution may be published on the same day of its introduction or passage, its publication must be at least three days before it can be voted upon. The direction is mandatory and not directory (*Matter of Smith*, 52 N. Y., 526), and the omission to comply with the requirement renders the assessment void. (Id.) This being a case of repavement, we discover in the papers nothing to prevent this result, and it becomes our duty to affirm the order made at the Special Term. The precise question discussed has not been considered in any case that I have found, or to which we were referred. The rules established by the decisions of the court of last resort are such that the omission of any prerequisite like the one mentioned must invalidate the assessment.

DANIELS, J., concurred.

Order affirmed, with ten dollars costs.

GEORGE K. SISTARE, JR., RESPONDENT, v. WILLIAM T.
CUSHING, APPELLANT.

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78 112

Partnership—effect of assignment of his interest therein by one partner to another.

One member of a partnership entered into an agreement with A, to hold two undivided fifth parts of such partner's interest in the firm in trust for A, and to account to A for the profits, etc., arising therefrom, and that on the dissolution of the partnership such two-fifth interest should immediately vest in A, and should be assigned and set over by such partner to A. One member of the partnership, with the consent of his copartners, but without the consent of A, made a voluntary assignment of all his interest in the partnership to one of his copartners, and retired from the business. *Held*, that this worked a dissolution of the partnership under the terms of the agreement with A.

APPEAL from a judgment rendered at Special Term. The facts are stated in the opinion.

John Chetwood, for the appellant.

Charles F. Sanford, for the respondent.

BRADY, J.:

On or about the 29th February, 1868, the parties hereto made an agreement as follows:

“Agreement made this twenty-ninth day of February, in the year eighteen hundred and sixty-eight, between William T. Cushing, of the first part, and George K. Sistare, Jr., of the second part.

“Whereas, the said Cushing is a member of the copartnership firm of Sanford, Cushing & Company, doing business as printers in the city of New York, under articles of copartnership bearing even date herewith, and is interested under said articles, in the business, assets, property and effects of said firm, and in the profits thereof, to the extent of five-sixteenths. And whereas said Cushing holds, and is to hold, two undivided fifth parts of his said share or interest, in trust for the benefit of said Sistare during the continuance of said partnership:

“Now, this agreement witnesseth, that said Cushing, in consideration of the premises and of the sum of \$16,000 to him in hand

FIRST DEPARTMENT, MAY TERM, 1875.

paid by said Sistare, the receipt whereof is hereby acknowledged, hath agreed and hereby doth agree, to account for and pay over to said Sistare, two-fifths of all such profits as shall accrue and be paid to said Cushing by reason of his said share or interest in said firm, from time to time, as the same shall so accrue and be paid; and upon its dissolution to assign, transfer and set over to the said Sistare two undivided fifth parts of the said share or interest of said Cushing in the assets and effects, including the good-will of said firm (such two-fifth parts of said share being equivalent to one-eighth of said assets); but it is understood and agreed that the right and title of said Sistare to such one-eighth part thereof *shall attach at once upon such dissolution* taking place; and said Sistare shall become and be, by force of such dissolution, and of these presents, fully vested therewith, without further conveyance from said Cushing or his personal representatives.

“And it is hereby mutually understood and agreed, that for all the purposes of said copartnership, and during its continuance, said Cushing is to represent, manage and control the entire interest which he holds, under said articles of copartnership as above mentioned, as fully, to all intents and purposes, as if vested absolutely therewith in his own right.

“And the said Sistare hereby further agrees fully to indemnify and save harmless the said Cushing against any loss which he may sustain as a member of said copartnership firm to the extent of two-fifths of such loss.

“In witness whereof the parties to these presents have hereunto set their hands and seals, the day and the year first above written.

“W. T. CUSHING. [L. s.]

“GEO. K. SISTARE, JR. [L. s.]

“In presence of HENRY A. ELLIOTT.”

At the time the agreement was made, the firm of Sanford, Cushing & Co. consisted of James H. Sanford, Michael Lienau, Marvin J. Merchant and William T. Cushing; and the partnership existing between them was, by its terms, to expire on the 31st of December, 1870.

On the 1st of March, 1870, the interest of Sanford having been transferred to Michael Lienau for Captain F. W. Bardua, by and

with the consent of all the copartners, it was by them agreed that the business of the new firm should, after that date, be carried on under the firm name of Cushing, Bardua & Co. The plaintiff knew of this change, and consented to it by extending the operation of the declaration of trust, as the agreement between them was designated, until the 31st December, 1873.

On the 11th January, 1872, Marvin J. Merchant transferred his interest in the firm to Michael Lienau, forever, subject to the terms of the copartnership, and to all debts and liabilities for which he might be responsible as a member of the firm, and which liabilities Lienau assumed. This assignment was known to, and acquiesced in, by all the partners. The plaintiff did not consent to this change, and, when advised of it, regarded it as a dissolution of the copartnership, and claimed his rights under the agreement between him and the defendant.

The parties agreed that the right and title of the plaintiff to one-eighth of the defendant's interest in the copartnership should attach at once, upon a dissolution of the firm taking place, and that the plaintiff should become and be, by force of such dissolution, fully vested therewith without further conveyance from the defendant or his personal representatives.

The first question presented, therefore, is, whether the transfer by Merchant to Lienau, operated as a dissolution of the copartnership existing between him and his associates. It must be borne in mind that the assignment by Merchant is not one of his interest to pay his debts, or to secure a creditor, or made when he was in failing circumstances. It must also be kept in view that it was not made without the knowledge or against the wishes of his associates, but with their knowledge and assent, and that by its terms it divested him of all right and title to the property and effects of the partnership, and provided for the payment of his liabilities as a partner by Lienau's assumption of all such obligations. It is unlike the case, therefore, to which we were referred on the argument of this appeal (*Marquand v. N. Y. Manfg. Co.*, 17 Johns., 525), and which was an assignment without the consent of the members of the firm to which the assignor belonged, and either voluntary on his part or impelled by the circumstances suggested. Whether one partner can, by a vol-

untary assignment of his interest during the period of a partnership, dissolve it, may be a vexed question, but it seems to have been settled in this State by the case of *Marquand v. Manufacturing Co.* (*supra*), and others to which reference will be made; but that question does not necessarily arise on the facts detailed.

The question here is, whether the transfer by one partner of all his interest in the firm of which he is a member, with the consent of his associates, does not *ipso facto* dissolve the firm so far as he is concerned, and it is a question about which there can be little doubt, and one which needs little discussion.

The effect of an assignment by one partner has been declared. In *Ketcham v. Clark* (6 Johns., 146), an assignment was made by one of two partners, of all his share in the partnership stock, to a third person, and VAN NESS, J., said: "This act was of itself a termination of the partnership." In *Marquand v. New York Manufacturing Co.* (*supra*), the same rule is asserted. When the partner becomes a bankrupt, it is the assignment that follows which works the dissolution. It is because the unity of interest is severed between the contracting parties. (*Fox v. Hanbury*, Cowp., 448; *Hague v. Rolleston*, 4 Burr., 2176; *Ex parte Smith*, 5 Vesey, 295.) In *Skinner v. Dayton* (19 Johns., 536), PLATT, J., said that the right to withdraw from a firm was one inseparably incident to every partnership. "Every partner," said he, "has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect * * * the only consequence being that he subjects himself to a claim for damages for breach of his covenant." In *Mumford v. McKay* (8 Wend., 442), it was held that the assignment by one partner of his interest in the partnership property, was a dissolution; "that the purchaser became a tenant in common with the other partner in the joint property." The effect of such an assignment is *ipso facto* to dissolve the copartnership (2 Parsons on Con., 171, and cases cited; *Horton's Appeal*, 13 Penn., 67; *Parkhurst v. Kinsman*, 1 Blatch., 488; *Whitton v. Smith*, 1 Free. [Miss.], 231.)

In the case of *Taft v. Buffum* (14 Pick., 322), one of four members of a firm assigned all his interest to one of his copartners, but still continued to transact the business of the firm in the same manner as before, and the court held that as to third parties such

an assignment would not *ipso facto* dissolve the copartnership, because the assignor might contribute his services only, and still remain a partner. Conceding, however, the principle that if he did not continue by acts to be a member of the firm, or if he ceased to be a member, from any circumstances, the dissolution was accomplished by the assignment. In this case the outgoing partner assigned all his interest in the partnership, and reserved nothing.

He provided, as already suggested, for the payment of his joint liabilities, and, since the assignment, has done nothing as a partner. The intention to retire from the firm is manifest, and it is equally clear that the remaining members of the firm so understood it; at all events they must be chargeable with notice of the legal effect of their own act.

The outgoing partner, receiving a compensation, must be supposed, under the circumstances attending the assignment, to have drawn from the firm all his money — all his interest — and having done so, withdrawn his personal obligation to respond for future debts contracted, if not to prior dealers without notice of his withdrawal, certainly to subsequent creditors. The plaintiff's contract was made with reference to existing things, and he had the right to insist, under his agreement, upon the benefit of the personal property and personal influence of H. B. Merchant, one of the members of the firm.

It might well be that he placed great reliance upon both of these elements, or upon one of them, even though it should appear that neither was of value. It is not important, however, to consider these incidents. If an assignment by one partner without the consent of his associates works a dissolution, it is very clear that when they consent, unless he be continued notwithstanding by a change of interest, there is no room for conjecture. No case to the converse of this proposition was cited, and none has been found. The search must be in vain. The attention of this court has been called to the case of *Ferrero v. Buhlmeier* (34 How. Pr., 33), a Special Term case, in which JONES, J., has reviewed some of the decisions in this State on the effect of an assignment by one partner, and in which he arrives at the conclusion that it does not work the dissolution of a partner-

ship, the term of which has not expired. The opinion is elaborate and able, but it is not applicable to this case. It is doubtful whether, if the facts were in accord, it would be given a controlling place, more particularly since the decision in 8 Wendell (*supra*) was not referred to. It is not necessary, however, further to discuss it. The adjudications in this State must prevail when there is a conflict between them and others in different places on such a question. The result of these views is, that the partnership existing when the agreement between the parties hereto was made, was dissolved by the assignment, and that the decision made at Special Term was correct. It follows that the plaintiff is entitled to the benefit growing out of that circumstance.

The next question we are called on to examine, is, whether the judgment rendered is proper. The consequences of a dissolution provided by the agreement, are, that the defendant should assign, transfer and set over to the plaintiff, two undivided fifth parts of his share in the assets and effects, including the goodwill of the firm (such two-fifth parts of said share being equivalent to one-eighth of said assets). The plaintiff demanded that the defendant should execute to him a conveyance of such two-fifths, and account to him for the moneys received to his use or to which he was entitled under this agreement. The defendant admitted, or rather alleged, in his answer, that the share which he held in his own right was worth \$16,000, and it was apparently upon that statement that a judgment for \$16,000 was entered, and a further judgment or decree made that the action be referred in order that an account might be taken. The judgment for \$16,000 is not warranted by the form of the action, or the allegations in the complaint, or the prayer for relief. The defendant did not undertake to pay any sum of money, except such as would cover the profits that would become payable to the plaintiff under the terms of the contract between them. When the contingency happened by which the agreement was consummated, he was to assign and set over the interest conveyed but held in trust. It was the two-fifths of the defendant's share that he was to hold in trust, and not the money which was paid as a consideration for the transfer. The defendant, by the action, was only called

on to perform his contract, and that could be done by his executing the contemplated assignment, and accounting for the profits. The judgment should have been for the plaintiff generally, with a further order that the defendant account, and the relief granted would then have been consistent with the obligations assumed by the agreement and the demand made by the complaint.

The duty seems to be imposed upon us, therefore, to affirm the decree in part, and to reverse it in part. We think this will be accomplished by reversing that part of the judgment which directs the payment of \$16,000, and affirming it as to the balance, and without costs to either party. This will leave it a judgment for the plaintiff with a reference to state accounts.

We think the plaintiff, however, should have the right to elect whether to accept this change or a new trial. In the event of the latter selection, the costs must abide event.

DAVIS, P. J., and DANIELS, J., concurred.

Ordered accordingly.

JACOB CARPENTER, APPELLANT, v. LOUISA A. BEARE,
RESPONDENT.

Inadequate damages—how question as to, reviewed—motion for new trial.

A party cannot, on appeal from a judgment entered on a verdict in his own favor, claim that the damages found were too small. His remedy is by a motion for a new trial on a case. (*Moore v. Wood*, 19 How., 405.)

The proceeding to obtain a new trial for inadequate damages, is, by analogy, the same as that for excessive damages.

APPEAL by the plaintiff from a judgment on a verdict in his favor, on the ground that the amount given was too small, and unauthorized by any evidence in the case.

Wilcox & Hobbs, for the appellant.

G. W. Davenport, for the respondent.

BRADY, J. :

The plaintiff claimed a commission of two and a half per cent on the sum of \$18,000, for which he had made a sale of the defend-

ant's property. There was no proof showing the value of the services rendered. The plaintiff claimed under an agreement by which he was to be paid the commissions mentioned, a claim which was denied, and upon which the jury were to pass upon conflicting evidence. The plaintiff, if the jury believed his demand to exist for any sum, was entitled to recover the two and a half per cent; but they gave him a verdict for less than one-half of the commissions. The plaintiff, however, made no motion for a new trial, either upon the minutes of the justice presiding at the trial, or at Special Term. His appeal rests entirely upon the inadequacy of the sum named by the jury, and upon his rights to a new trial for that reason. His omission to make a motion for a new trial, as stated, is fatal to the proceeding by appeal. It was determined in *Moore v. Wood* (19 How. Pr., 405), that a party could not move to set aside a verdict in his own favor, on the ground that the damages found were too small; that his remedy was by a motion for a new trial on a case. The decision was based upon the phraseology of section 264 of the Code, which did not expressly authorize such a motion on the minutes of the judge. It will be perceived, however, that the motion, under that section, may be made when the damages are excessive. In *McDonald v. Walter* (40 N. Y., 551), a different result was announced. Justice HARRIS entertained and granted such a motion, and the order he made was sustained upon the ground that the power of the court to award a new trial, when dissatisfied with the verdict, either for the reason that the verdict was clearly too large or too small, rested on precisely the same principle. Justice WOODRUFF said a verdict for a grossly inadequate amount stands upon no higher grounds in legal principle, nor in rules of law or justice, than a verdict for an excessive or extravagant amount. The question whether there was sufficient evidence to justify a verdict, must be raised by motion made either before the judge presiding on his minutes, or at Special Term (Code, §§ 264, 265; *Bulkeley v. Keteltas*, 4 Sandf., 450), and hence the declaration thus recognizing this necessity in *Moore v. Wood* (*supra*), that the plaintiff's remedy was by motion at Special Term, in the first instance. It is true that in *Mason v. Lord* (40 N. Y., 484), the Court of Appeals decided that a finding of fact, without any evidence to sustain it, was a legal error available in that court; but in that case the judgment was one founded upon the findings

of a court without a jury, and to which findings exceptions had been taken. There is no analogy between that case and this, therefore. The proceeding to obtain a new trial for inadequate damages, is, by analogy to that to obtain a new trial for excessive damages, the same in principle, and must be the same in form. A motion must be made either at the Special Term or upon the judge's minutes (Code, *supra*); and the plaintiff herein, having made neither, takes nothing by his appeal.

It has not been deemed necessary to pass particularly upon exceptions taken by the plaintiff during the trial. None of them was argued by his counsel, or presented on his points. It is sufficient to say of them, generally, that none of them was well taken, if indeed we are called upon at all to notice them, as to which, *quære*. It is not our duty to consider on this appeal whether the defendant should have had judgment in consequence of the alleged utter insufficiency of the evidence to establish the alleged agreement as to commissions. The jury have found against her, and, as long as the verdict stands, it is taken to determine that the plaintiff was entitled to recover. (*McDonald v. Walter, supra.*) The judgment should be affirmed, with costs to the respondent.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

GEORGE WEYMAN, PLAINTIFF IN ERROR, v. THE PEOPLE,
DEFENDANTS IN ERROR.

Larceny — property obtained by artifice — when title does not pass — Intent — how may be shown.

The prisoner received a lot of jewelry from Kuhn & Co., with the understanding that if not sold the jewelry was to be returned, and that if any part was sold he was to return the price of the part so sold. *Held*, that, under such arrangement, the title to all the articles not sold remained in Kuhn & Co.

Held, that if the possession of the jewelry was obtained feloniously, for the purpose of depriving the owners of it, by means of such artifice, it constituted the crime of larceny.

The distinction between this class of cases and obtaining money by false pretenses, is, that in the latter the owner intends to part with his title.

4	511
58	281
4	511
18ap	242
4	511
38ap	343
4	511
37ap	284
4h	511
64m	4455
64m	476

For the purpose of showing the guilty intention in such case, it is competent to show that the party accused was engaged in other similar frauds about the same time, when the transactions are so connected as to time, and so similar in their other relations, that the same motive may reasonably be imputed to them all.

Writ of error to the New York Court of Oyer and Terminer, on conviction of the plaintiff in error of the crime of grand larceny.

George Weyman, plaintiff in error, was tried at the February term of the Court of Oyer and Terminer, for the county of New York, 1875, upon an indictment for grand larceny, convicted, and sentenced to imprisonment in State prison for five years.

He was a jeweler, doing business at No. 17 John street. On the twenty-seventh day of November, he sent his clerk, with a memorandum order, to the firm of Charles Kuhn & Co., jewelers, doing business at No. 18 John street, which order called for certain articles of jewelry — a memorandum order meaning, in the jewelry business, to convey the idea, among persons engaged in that business, that the person who sends the order wants the articles specified in the order for the purpose of showing them to some particular customer, with a view of enabling the customer to inspect the goods, and to decide (out of the number sent) which he will take, and, when he has decided, that the balance shall be returned, together with the cash for the one or more actually sold. Messrs. Kuhn & Co. sent five pairs of bracelets, delivering the same to the clerk, who, in turn delivered the same to Hiram Kraft, the agent of George Weyman, and who was in his employ. Subsequently Weyman called upon Kuhn & Co., saying to them that he had shown the bracelets to his customer, and that his customer had not decided as to which he would take, and that he wanted until next morning to decide, which request was granted. Weyman subsequently left the city, and, upon the twenty-seventh day of January following, was arrested in California, and upon a requisition brought back to the city of New York. Messrs. Kuhn & Co. never received back the bracelets, or any money from Weyman realized upon any sales. Upon the question of the "intent" of Weyman at the time he got the bracelets from Messrs. Kuhn & Co., the court permitted the district attorney to prove that Weyman had obtained, upon the twenty-fourth day of November preceding, of the same year, from

the firm of Smith & Hedges, jewelers, of No. 1 Maiden lane, a set of diamond studs upon a like pretense, and on the twenty-fifth November, two watches of Reuben S. Middleton, none of which were returned.

W. F. Kintzing, for the plaintiff in error. It is not larceny if the owner of personal property intends to part with the property and delivers the possession absolutely, although he has been induced to part with it by fraudulent means. (*Smith v. The People*, 53 N. Y., 111; *Ross v. The People*, 5 Hill, 294; *Lewer v. Commonwealth*, 15 Serg. & Rawle, 93; 2 East P. C., 668, and cases cited; Wharton Am. Cr. Law [5th rev. ed.], 1780; Archibald's Crim. Pl., 895; 1 Russell on Crimes, 563; *Com. v. James*, 2 B. & H. Ldg. Cr. Cases [2d rev. ed.], 181, 204; *Blunt v. Com.*, 4 Leigh, 689; *Rex v. Jackson*, 1 Moody C. C., 119; *Mowrey v. Walsh*, 8 Cow., 238; *Regina v. Barnes*, 2 Den. C. C., 59; *Reg. v. Thomas*, 9 Carr. & P., 741; *Reg. v. Adams*, 1 Den. C. C., 38; *Rex v. Adams*, Russ & Ry. C. C., 225.) If the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. (1 Hawkins P. C., § 1, p. 208; *Reg. v. Middleton*, 12 Cox's Crim. Cases, 260; *People v. McDonald*, 43 N. Y., 61; 2 Russell on Crimes [6th ed.], 35; *Hilderbrand v. The People*, 56 N. Y., 394.) There was not sufficient trespass to constitute larceny. (*Reg. v. Thomas*, 9 Carr. & Payne, 741; English Am. Law Rep., 314.) It is well settled that stolen property can at all times be reclaimed by the owner, although it may have been purchased by an innocent purchaser, in good faith and for a consideration. That is upon the theory that he has never voluntarily parted with his property; the title to the same still remains in him. Did the prosecutor in case at bar part with his property in the jewelry? When he gave the articles of jewelry into the possession of the accused, he gave him the right to sell and dispose of them to a customer, to convey title to the purchaser. Certainly the accused must have had property in the jewelry; otherwise he could not convey it; and if the accused had sold the jewelry, the original owner never could recover the specific articles, or the price of them, from the purchaser. It is well settled that testimony of the

prisoner's guilt or participation in the commission of a crime, wholly unconnected with that for which he is put on trial, cannot be admitted. (Roscoe's Crim. Ev. [7th ed.], 92, and note; *Com. v. Call*, 21 Pick., 215; *Dunn v. State*, 2 Ark., 229; *Bottomley v. United States*, 1 Story, 135.) Therefore, it is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit crime. (1 Roscoe's Crim. Ev., 57; 1 Leigh, 574; Barbour's Crim Law [2d ed.], 395.) Nor is it competent to prove other acts, going to establish another distinct offense, for the purpose of raising an inference that prisoner has committed the offense for which he is on trial. (2 Russell on Crimes [6th ed.], 776.) No principle of law is better settled than that the law presumes every citizen to be a person of good character, and that, on the trial of a criminal action, the prosecutor can in no way impugn the defendant's character, unless such defendant puts his or her character in issue. (*People v. Bodine*, 1 Den., 291; *People v. White*, 24 Wend., 520; *People v. White*, 14 id., 167; *People v. White*, 14 id., 112; *People v. Lamb*, 2 Keyes, 378; *State v. O'Neil*, 7 Iredell, 251; *Ackly v. People*, 9 Barb., 69; *Commonwealth v. Hardy*, 2 Mass., 317; 3 Greenl. on Ev., 25; 1 Phillips on Ev., 177, 145.)

Horace Russell, assistant district attorney, for the people. Where with the *animus furandi* a person obtains consent to his temporary possession of property and then converts it to his own use, he is acting against the will of the owner and is a trespasser. (*The People v. Hildebrand*, 56 N. Y., 394; *The People v. Smith*, 53 id., 111; *The People v. McDonald*, 43 id., 61; *The People v. Call*, 1 Denio, 120; *Lewer v. The Commonwealth*, 15 S. & R., 98; 1 Hawkins P. C., chap. 33, § 9, p. 509; 2 Russell on Crimes, 22; *Starkie's case*, 7 Leigh, 752; *Reg. v. Slowly*, 12 Cox Cr. C., 269; *Reg. v. Bird*, id., 257; *Rex v. Stanley*, Russ. & Ryland, 305; *The State v. Watson*, 41 N. H., 533; *The State v. Humphrey*, 32 Vt., 569; *Welsh v. The People*, 17 Ill., 339; see 2 Bishop's Crim. Law [5th ed.], 444, § 811, and notes, where the cases are collated.) The transaction which was the subject of this prosecution being one of the many done in pursuance of the general intent, proof of the other transactions establishing the general intent was

admissible. (*Wood v. The United States*, 16 Pet., 360; Wharton Crim. Law [6th ed.], 650; *Com. v. Eastman*, 1 Cush., 189; *Com. v. Tuckerman*, 10 Gray, 173; *Reg. v. Richardson*, 8 Cox, 448; *Com. v. Stone*, 4 Metc., 43; *Com. v. Jenkins*, 76 Mass., 485; *Copperman v. The People*, 56 N. Y., 591; *Bielschoffsky v. The People*, MS.; 1 Bishop on Cr. Pro., 666, and cases cited.)

DANIELS, J.:

It appeared, upon the trial, that the prisoner, on the 24th of November, 1874, sent what was known as a memorandum order to Charles Kuhn & Co., jewelers, carrying on business at No. 18 John street, in the city of New York, for six pair of gold band bracelets, which were thereupon sent to him by that firm. The prisoner was engaged in the same business and, in its transactions, the order was designed and understood to be an application for the articles mentioned in it, for the purpose of showing them to a customer, and enabling him to inspect them and select out of the number sent, which, if either, he would take, and, if he accepted either, that the money for that, with the remainder of the articles, should be returned to the persons sending them on the order. And the evidence tended very directly to show that such was the character of this transaction between the prisoner and Kuhn & Co. But neither the articles sent to him, nor the money for either of them, were at any time returned by him.

Upon these facts it was objected by the prisoner's counsel that he could not be convicted of larceny, because, upon the delivery of the articles, both the title to them, and their possession, passed to him. But this position cannot be maintained, for the title certainly did not pass. The property, under the arrangement, remained in Kuhn & Company in all the articles not sold by the prisoner. He had the power to sell and transfer the title to such of the articles as he might dispose of in that manner. But until a sale was made, the title was in no respect changed. It continued uninterruptedly in the persons from whom they were procured, as long as no sale was made by the prisoner. That was clearly the design and effect of the transaction. It was not its purpose, that the title in any event should pass to the prisoner. He was the mere custodian of the property for the persons sending it to him; and if he acquired

that feloniously, for the purpose of depriving the owners of it by means of the artifice he made use of to obtain it, that was sufficient, within the rule sanctioned by the authorities, to constitute the crime of larceny. (Whart. Crim. Law [4th ed.], 1847-1852; *Hilderbrand v. People*, 8 S. C., 19; 56 N. Y., 394; *Smith v. People*, 53 id., 111.) Whether he did or not was a question for the jury under the evidence given in the case, and that was fairly submitted to them for their determination. The distinction between this class of cases, and obtaining property by means of false pretenses, seems to consist in the circumstance, that in the latter the owner intends to part with his title with the change of custody, while in the former no intention of that kind exists.

The people were allowed to show that the prisoner, on the same day and the day following that on which he procured these articles from Kuhn & Company, in the same way and by similar means, procured other articles of jewelry from other persons, and appropriated them to his own use. This evidence was offered and received for the simple purpose of establishing his intent to be felonious in obtaining those mentioned in the indictment. His counsel excepted to the ruling under which it was admitted, and now relies upon the exception for the reversal of the conviction. By the evidence which was excepted to, it appeared that the prisoner, on the twenty-fourth of November, obtained from Smith & Hedges, jewelers in Maiden lane, a set of diamond studs, worth \$500, on a representation that he had a customer for them; and on the next day, the twenty-fifth, procured from R. S. Middleton, another jeweler in the same street, two gold watches on a similar representation; all of which were to be returned by him unless they were purchased by the customers, and in that event, the money was to be returned instead of the article it might be received for. The three transactions occurred within two days, and the similarity in their leading features and characteristics, justified the conclusion that they were pervaded and controlled by the same general intention. It was one intent, manifested by three distinct acts. But that so far connected them as to render them all manifestations of the same purpose. It combined them in one felonious plan, each of which was but a portion of its execution. And the several acts were allowed to be shown, in order to enable the jury to determine

what was the intention of the prisoner in the one which was the subject of the indictment. That was the gist of the crime it was charged he had committed, and, ordinarily, proof of its existence must depend upon the circumstances attending the transaction.

In other cases where the intention with which an act has been performed has been a material circumstance to be ascertained, evidence of this description has been received. Where goods have been obtained by means of fraudulent representations, it has been held that as the intent is a fact to be arrived at, it is competent to show that the party accused was engaged in other similar frauds about the same time; provided that the transactions are so connected as to time, and so similar in their other relations, that the same motive may reasonably be imputed to them all. (*Hall v. Naylor*, 18 N. Y., 588, 589; *Hennequin v. Naylor*, 24 id., 139; *Allison v. Matthieu*, 3 Johns., 235; *Rankin v. Blackwell*, 2 Johns. Cas., 198; *Bielschowsky v. People*, 10 S. C., 40; *Com. v. Eastman*, 1 Cush., 189.) The same thing is very common for the purpose of establishing guilty intent on trials for passing counterfeit money, and in other cases mentioned in section 15, volume 3, of Greenleaf on Evidence. In *Stuart v. Lovel* (2 Stark., 84) Lord ELLENBOROUGH declared that there was no doubt but that other libelous publications would be admissible in proof of the intent, on the trial of an indictment for a libel. And in *Reg. v. Dossett* (2 Car. & Kir., 306), on an indictment for feloniously setting fire to a rick of wheat-straw, proof was allowed to show that it had been previously set on fire by the prisoner firing a gun very near to it. In that case Justice MAULE held, that in many cases it is an important question whether a thing was done accidentally or willfully. If a person were charged with having willfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of a distinct felony. In the cases of uttering forged bank notes, knowing them to be forged, the proofs of other utterings are received to show the intent, while all are distinct felonies. Several cases are added in a note to this decision, fully sustaining the principle mentioned by the court.

The case of *Reg. v. Richardson* (2 Post. & Fin., 343) is still more analogous to the present one. The trial was for embezzlement, and evidence was offered of similar errors in the prisoner's account, before and after those forming the subject of the charges. This was objected to on his part, but the proof was held to be proper, and it was received by the court.

And a decision quite similar was made on the trial of an indictment for the same offense, in the case of *Com. v. Tuckerman* (10 Gray, 173). The case of *Reg. v. Geering* (18 Law Jour. [M. C.], 215) went quite as far as the court did upon the trial of the prisoner. That was an indictment for murder by means of arsenic; and the prosecution proposed and was allowed to show, on the trial of the prisoner for poisoning her husband by arsenic given him in tea prepared by her, that arsenic had been taken into the stomach of three of her sons at other times; that two of them had died of poison, and that the symptoms of all the four parties were the same; that they all lived with the prisoner, and formed part of her family; that she generally made the tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. POLLOCK, C. B., held this evidence proper, and stated that ALDERSON and TALFOURD concurred with him. He added in his decision, that it was not inadmissible by reason of its having a tendency to prove a subsequent felony.

Moggs case (4 C. & P., 364) was disposed of under the same principle. The prisoner was indicted for administering arsenic to horses, and the prosecution was allowed to show, as evidence of his intent, that it had been done by him on other occasions. Hinckworth's case was an indictment for robbery. The prisoner went with a mob to the prosecutor's house, and one of the mob went to him, and civilly, and, as he believed, with good intention, advised him to give them something to get rid of them, which he did. To show that this was not *bona fide* advice, but simply a mode of robbing the prosecutor, evidence was received of other demands of money by the same mob, at other houses, at different periods of the same day, when some of the prisoners were present. And it was held by PARKE, J., to be proper, after a conference with VAUGHAN and ALDERSON, and in which LORD TENTERDEN con-

curred. Other cases of the same general tenor will be found in Roscoe's Criminal Evidence (5th Am ed.), 81-83, 94, 95.

The evidence which was received by the court on the trial of the prisoner, seems to have been within the principle maintained by these authorities. If other criminal acts can be received, as they most certainly have been, with the sanction of the courts, for the purpose of proving the intent with which the act charged as criminal was committed, no good reason exists for excluding it in prosecutions for larceny. The intent is the vital fact to be ascertained; and other acts, plainly within one common purpose or design, have been allowed as legal evidence of it. In treason, murder, robbery, arson, embezzlement, fraud, receiving stolen goods (*Copperman v. People*, 8 S. C., 15; 56 N. Y., 591), and other cases, such acts, as proof of intent, have been received, and no reason appears why larceny should not be included in the same principle. The prisoner's counsel insists that it was a violation of the rule precluding the prosecution from proof of bad character, when no evidence on that subject was given on his part. That rule does not include direct evidence of the prisoner's guilt. It relates to general proof of character, and nothing else. Facts tending to prove the accused guilty of a specific crime, may incidentally affect his character, as they certainly would, but that is no reason why they cannot be proved. If it were, no person could ever be proved guilty of a crime which he himself did not confess. The proof offered and received by the court was that of a fact constituting a material ingredient of crime. It was direct proof of guilt in no sense in conflict with the rule invoked in support of the exception taken. The object of it was to show that the prisoner was probably actuated by one general intention including all the property he managed to obtain on the three different occasions, and it had a direct tendency to exhibit the nature and character of that intent. It was received solely for that purpose, and directly tended to show an intention to steal when the property was procured which was the subject of the trial. The prisoner was rightly convicted, and the judgment should be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

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**SIGISMUND SCHWAB, PLAINTIFF IN ERROR, v. THE PEOPLE
OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.**

Selling liquor without license — Indictment — Chapter 578, Laws of 1866 — chapter 175, Laws of 1870 — Repeal of repealing law — effect of.

Although section 15 of chapter 628 of the Laws of 1857, was, by chapter 378 of 1866, rendered inapplicable to the city of New York, yet the latter statute was repealed by chapter 175 of 1870, and the former statute restored.

When a statute repealing a preceding statute is itself repealed, the original act is revived and continues in force from that time.

In an indictment for selling liquor without a license, it is sufficient to allege that the liquor was sold in the Ninth ward of the city of New York, to be drank in the house, store, shop and place of the seller, without stating the name of the street or the number of the house.

It is not necessary, to constitute an offense under the statute, that the wine should be intoxicating.

WRIT of error to the Court of Oyer and Terminer, held in and for the county of New York, to review the conviction of the plaintiff in error for violation of the excise laws, in selling wine without a license.

John McKeon, for the plaintiff in error. The prosecution should aver the number of the house and the street in which the offense was committed. (*State v. Gore*, 34 N. H., 510; *State v. Allen*, R. M. Charlton, 518; 11 Hargrave State T., 299; *Com. v. Cook*, 13 B. Mon., 149; 1 Hale's P. C., 517, 526, 535; 2 id., 170; *People v. Allen*, 5 Denio, 79; Chitty Cr. Pleadings, 200; Bishop on Cr. Proceedings, 75; Wharton Cr. Law, § 682, 265.) The court erred in refusing to charge that the prosecution having failed to prove that Rhine wine is of intoxicating nature (a strong and spirituous liquor), the defendant should be acquitted. (*Board of Tompkins v. Taylor*, 21 N. Y., 177; *Nevin v. Ladrue*, 3 Denio, 450.)

B. K. Phelps, for the defendants in error. The indictment need not allege the price for which the liquor was sold. (*State v. Downer*, 21 Wis., 274; *Cochran v. State*, 26 Texas, 678; *Wrock*

ley v. State, 1 Clarke [Iowa], 172; *State v. Muntz*, 3 Kan., 383; *State v. Fanning*, 38 Mo., 359; *Comm. v. Thayer*, 8 Met., 525; *People v. Adams*, 17 Wend., 475.) It was sufficient to allege that the offense was committed in the Ninth ward of the city of New York. (Bishop Stat. Crimes, § 385; *State v. Nixon*, 18 Vt., 70; Rosc. Cr. Ev. [7 Am. ed.], 89; Archb. Cr. Pl. [13th Lond. ed.], 749; 1 Whart. Cr. Law [7th ed.], §§ 277-280; *Reg. v. Brooke*, Carr. & M., 543; *Rex v. Perkins*, 4 Carr. & Payne, 363; *Rex v. Napper*, 1 Moody C. C., 44.) The failure of the commissioners to establish a rate for licenses was no defense to the prisoner. (*Commonwealth v. Blackington*, 41 Mass., 352; *City Council of Charleston v. Hollenback*, 3 Strob., 355; *City Council of Indianapolis v. Fairchild*, 1 Carter [Ind.], 315; *State v. Jamison*, 23 Mo., 330; *State v. Downer*, 21 Wis., 274; *Mayor and Ald. v. Mason*, 1 Abb. Pr., 334; S. C., 4 E. D. Smith, 142.)

DANIELS, J. :

The defendant in error was convicted of a misdemeanor, committed by selling wine without license, in a quantity of less than five gallons, to be drank upon his premises. The indictment was found under the act of April 16, 1857. By that act it was provided that whoever shall sell any strong or spirituous liquors or wines, to be drank in his house or shop, or any out-house, yard or garden appertaining thereto, or shall suffer or permit any such liquors or wines sold by him, or under his direction or authority, to be drank in his house or shop, or in any out-house, yard or garden thereto belonging, without having obtained a license therefor, as an inn, tavern, or hotel keeper, shall forfeit fifty dollars for each offense. (2 R. S. [5th ed.], 942, § 15.) And a violation of this provision has been held to be a misdemeanor. (*Behan v. People*, 17 N. Y., 516.)

But the counsel for the plaintiff in error objects, that this section of the statute has been rendered inapplicable to the county of New York; and that was probably the case while chapter 578 of the Laws of 1866 remained in force. (Vol. 2, Laws of 1866, 1242.) But that was expressly repealed by section 6 of chapter 175 of the Laws of 1870 (vol. 1, Laws of 1870, 458); and that section declared that the act of April 16, 1857, should be and remain in full force

and effect throughout the State, so far as it was not inconsistent or in conflict with the provisions of the act of 1870. It is not objected that any conflict or inconsistency exists between section 14 of the act of 1857, being the one already referred to, and the provisions contained in the act of 1870. But as a large number of acts were passed on the 16th of April, 1857, and the particular act intended to be revived was not mentioned in section 6 of the act of 1870, it is objected that this section did not have the effect of rendering the act regulating the sale of strong and spirituous liquors and wines, passed on that day, applicable to the city and county of New York. The reference to the act designed to be affected by this provision, was by no means certain or definite in its character. But as the act repealed by the section mentioned, modified in important respects the act regulating the sale of liquors and wines, enacted in the year 1857, it is evident that the latter was what the legislature intended to be understood by the reference it made to the act passed April 16, 1857. It was the only act passed on that day in any way relating to or affecting the sale of strong or spirituous liquors or wines; and as the act of 1870 regulated the same subject in part, its adoption must have been intended, by the provision which was made by that act, for the restoration of the preceding law, as long as both were required for the completion of the system. Even though the reference was obscure, as long as the intent of the legislature was manifested with reasonable clearness, the statute should be construed so as to carry it into effect. But, even if the reference was so uncertain as to be incapable of being maintained, the result would not be of the slightest benefit to the plaintiff in error, for the act of 1857 was revived by the mere repeal of the act of 1866. The rule upon that subject is, that when a statute repealing a preceding statute is itself repealed, the original act is revived, and continues in force from that time. (Sedgwick on Statutory and Const. Law, 137, and cases referred to.) In either view, the objection taken is without the least color of support. No doubt can be entertained that the section of the act of 1857, already quoted, was applicable to the city of New York when the sale was made for which the conviction was had.

The indictment was in the usual form for the sale of spirituous

liquor or wine without license. (*Hodgman v. People*, 4 Denio, 235; *People v. Townsey*, 5 id., 70.) It contained the averment in the first count, that the sale was made in the Ninth ward of the city of New York, to be drank in the house, store, shop and place of the seller, the plaintiff in error. And that was all that was required in this respect to bring the case within the restraint imposed by the statute. (Whart. Am. Crim. Law [4th ed.], §§ 277, 284.) It fully apprised the plaintiff in error of the nature of the accusation made, and of the time and place where it would be claimed by the prosecution the offense had been committed by him. The fact that the commissioners had not determined the amount which should be charged for licenses, was no defense to the indictment. The offense consisted in selling without license, with liberty to the purchaser to drink the article sold in the house or shop of the seller. It was in no respect rendered dependent on the conduct of the commissioners, but resulted solely from that of the accused.

The objection taken to the proof given by the prosecution to show that the seller had no license, cannot be sustained; for no such proof was required to be given to make out the people's case. (1 Greenleaf on Evidence [7th ed.], § 79; *Fleming v. People*, 27 N. Y., 329, 334.) And defective evidence as to the fact, even if it had been given, could work no possible injury to the accused; and besides that, he himself swore that he had no license.

An exception was taken to the refusal of the court to charge the jury that they must acquit the accused, because the prosecution failed to prove that the wine sold was of an intoxicating nature. The instruction was properly declined, because the statute did not require that to be shown in order to create the offense charged. By the provision made upon this subject, if strong or spirituous liquor or wine was sold, to be drank in his house, shop, out-house, yard, or garden appertaining thereto, by the accused, without license, the case was made out. The statute did not require the wines to be shown to be intoxicating for that purpose. It is sufficient if wine to be drank be sold under the prohibited circumstances. The case of *Commissioners of Excise v. Taylor* (21 N. Y., 173), affords the plaintiff in error no assistance on this point. The court, in directing that, did not hold that proof was required that the article was intoxicating, when the subject of the sale was either strong or

spirituous liquor or wine, but it was there held that strong beer was included in the terms strong or spirituous liquors. The law, in plain terms, prohibited the sale of wine in quantities less than five gallons, to be drank on the premises of the seller, when it was made without license. This included all wines used for drinking. And the terms, as well as policy of the law restrained the business to those persons alone who should be licensed to carry it on. The proof tended to show that the accused sold wine in a less quantity than five gallons, to be drank in his house and shop; and that was sufficient, if the jury believed the evidence, as long as he had no license, to make out the case against him.

An exception was taken to certain comments made in the charge, on the evidence given by the informer, indicating the necessity which existed for the employment of such persons, to secure the enforcement of the law, and to require persons selling wines and liquors in small quantities to take out licenses. These comments were not designed to, and did not, withdraw the credit which might be due to the witness, from the decision and control of the jury. On the contrary, they were informed that such evidence was ordinarily to be carefully scrutinized, and that they were the sole, exclusive and uninfluenced judges of the credit to be given to it. With this qualification, nothing was said which was not within the peculiar province of the court, or that the accused had the least reason to complain of. (*Jackson v. Packard*, 6 Wend., 415; *Durkee v. Marshall*, 7 id., 312.) The case was correctly disposed of by the Court of Oyer and Terminer, and the judgment should be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

CHARLES B. WOOD, PLAINTIFF, v. LUCY D. FISK,
EXECUTRIX, ETC., DEFENDANT.

Code, § 335—death of surety—liability of estate of, on undertaking required by section 335.

An action may be maintained against the estate of a deceased surety who was a party to an undertaking given, in pursuance of section 335 of the Code, to stay proceedings upon a judgment during the pendency of an appeal.

Getty v. Binsee (49 N. Y., 385) and *Pickersgill v. Lahens* (15 Wall., 140) distinguished.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term.

The plaintiff recovered a judgment against William Belden, on the 20th day of November, 1867, for \$2,530.41. An appeal was taken by the defendant from the judgment to the General Term; and, for the purpose of obtaining a stay of proceedings while that was pending, James Fisk, Jr., and W. B. Bradford executed an undertaking in the form prescribed by section 335, of the Code of Procedure. The judgment was reversed by the General Term, and an appeal was then taken by the plaintiff to the Court of Appeals, where the decision of the General Term was reversed, and the judgment as it was originally recovered was affirmed. Judgment to that effect was duly entered on the 9th day of July, 1873. James Fisk, Jr., died on the 7th day of January, 1872.

After the judgment of affirmance was entered on the decision of the Court of Appeals, an action was commenced and judgment recovered by the plaintiff against Bradford, on the undertaking given by himself and Fisk. An execution was issued against property, and returned unsatisfied on that judgment; and the plaintiff thereupon commenced this action against the defendant, as executrix of James Fisk, Jr., to recover the amount due on the judgment against Belden, with the costs of the appeal, upon the undertaking executed for the purpose of staying the plaintiff's proceedings when the appeal was taken. The court on these facts dismissed the plaintiff's complaint, and ordered the exceptions to the decision to be first heard at the General Term.

Rastus S. Ransom, for the plaintiff.

Erastus Cooke, for the defendant.

DANTELS, J. :

The decision made by the learned justice who presided at the Circuit, was designed to follow and apply the rule maintained by the cases of *Getty v. Binsse* (49 N. Y., 385), and *Pickersgill v. Lahens* (15 Wall., 140). Those cases, following other authorities referred to in the opinions, hold that the creditor's remedy for the collection of his debt against a surety is extinguished by his decease ; that no proceedings can be maintained for its recovery against the personal representatives. The action in *Getty v. Binsse* (*supra*), was upon a joint note voluntarily given and accepted in that form ; and the liability of the estate of the surety upon it may, for that reason, have been controlled by considerations entirely inapplicable to the undertaking on which the present action was brought. In *Pickersgill v. Lahens* (*supra*), the suit was upon a bond given in compliance with a provision contained in the Revised Statutes of this State, prescribing the security which should be required to justify the issuing of an injunction to stay proceedings at law. (3 R. S. [5th ed.], 270, § 70.) That statute, in terms, required a bond conditioned for the payment to the plaintiff in the action proposed to be stayed, of all moneys which he might recover in such action for debt, damage or costs. No other provision was made defining the extent of the obligation to be incurred in its execution. And as the instrument required was one of a fixed and settled nature, upon which the liability of the persons executing it was clearly defined by the principles of the common law, there would seem to be no impropriety in holding the surety discharged, under circumstances ordinarily attended with that result, when a bond has been executed by him. By providing for a bond without prescribing its effect, that was left to be determined by the common law so far as it applied to instruments of that character. The statute did not declare under what circumstances the sureties might be discharged, but the common law had already done that when the enactment was made that a bond should be the instrument to be taken. And as that law was neither expressly nor

impliedly rendered inapplicable, it governed the liability of the sureties, as it did in all bonds so far as the statute did not interfere with it. The estate of the surety was for that reason properly relieved from liability, because the statute had left the common law applicable to the case, by omitting to declare what the effect of the decease of the surety should be upon his obligation. The same principle was applied to a joint and several bond, after a joint judgment had been recovered upon it, in the case of *The United States v. Price* (9 How. [U. S.], 90), under circumstances quite similar in their effect. But the present action was brought upon an instrument entirely unknown to the common law. It was purely a creature of the statute, devised for the accomplishment of a special purpose, that would be defeated, at least in part, by the application of this principle of the common law. Its object was to procure for the party on whose behalf it was given, a stay of all proceedings pending the appeal taken from the judgment, and to render the persons executing it absolutely liable for the payment of the amount recovered by an affirmance, if the appellant failed to satisfy it. For that purpose the statute required that it should be executed by at least two sureties, binding them to the effect that if the judgment appealed from or any part thereof should be affirmed, or the appeal be dismissed, the appellant would pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment should be affirmed, in case it should be affirmed only in part, and all damages awarded against the appellant on the appeal. (Code, § 335.)

It was clearly the design of the legislature to provide the respondent with a complete security for the payment of the judgment recovered by him, if, in the end, it should be either partially or wholly affirmed. And that would be entirely defeated in case of the death of both sureties, an event which in no instance can be altogether improbable, if the principle governing the exoneration of their estates at common law should be held controlling in the case. The law provides that new sureties may be required in place of those who may become insolvent after the undertaking has been given. But it has required nothing of that kind in case of their decease, unattended with insolvency. And that omission indicates it to have been the judgment of the legislature, that in that event

no further security could be required for the respondent's protection. While if the common-law principle relied upon in support of the decision made at the Circuit, applied to such a case, the judgment would still be stayed, and the appeal would proceed without any security whatsoever existing in the case. The provision made for this security could not have been designed to be subject to such a contingency, and yet it clearly would be, if the common law should be adopted as controlling in the case.

By another provision of the Code, the lien of the judgment may be entirely removed from the debtor's property during the pendency of the appeal, when the undertaking requisite to stay execution has been given. (Code, § 282.) And that certainly would not have been permitted, if the liability of the sureties in it had been designed to be contingent on anything else than the result of the appeal. If it had been, then the law would provide the means for wholly depriving the judgment creditor of security for its payment, instead of rendering it reasonably certain that the debt should be collected if the judgment proved to be correct. That would be clearly inconsistent with the object the legislature intended to secure by requiring the undertaking to be given.

The law prescribed the form of the obligation which the sureties were required to incur in order to stay the proceedings of the successful party during the pendency of an appeal from the judgment recovered by him. And that required them to become bound for the payment of the judgment, in case it should be affirmed, and the appellant failed to pay it. That was the only contingency on which their liability was rendered dependent. It was the express design of the legislature that they should become bound to that effect. And that would be defeated if the death of either should be held to discharge his estate from all the consequences of his undertaking. The law not only requires no such construction, but it would be inconsistent with the purpose intended to be attained by means of its enactment. The system devised was a new one, intended to be carried into effect, as far as that could be done, by means of its own provisions. Upon the effect of the undertaking which was entered into, they are reasonably free from doubt. And that was, that the sureties should pay the debt, in case

the judgment was affirmed and left unpaid by the appellant. The liability was established by the evidence given upon the trial of this cause, and a verdict should have been directed in the plaintiff's favor. The motion made in his behalf must be allowed to prevail, by setting aside the verdict and directing a new trial of the action to be had.

DAVIS, P. J., and BRADY, J., concurred.

Motion for new trial granted, costs to abide event.

LUCAS H. WEETJEN AND OTHERS, RESPONDENTS, v. THE ST. PAUL AND PACIFIC RAILROAD COMPANY AND OTHERS, APPELLANTS.

Railroad bonds—right of bondholders to maintain an action to prevent diversion of property covered by a mortgage given to secure them—bona fide purchasers.

This action was brought by the holders of certain railroad bonds, secured by a mortgage—which provided that all property subsequently acquired by the company should become part of the property covered thereby—to restrain the fraudulent diversion of certain iron rails (subsequently acquired by the company), under a resolution of the board of directors authorizing one of the trustees of the mortgage to sell, pledge or dispose of the same, for the purpose of raising money to meet past and future estimates for the construction account of the extension of the road. *Held*, that the plaintiffs were entitled to maintain the action, and that a temporary injunction was properly granted therein.

Part of the iron had, before the commencement of this action, been pledged with firms, of which the said trustee was a member, to secure advances made thereon to the road. *Held*, that the knowledge of the trustees was the knowledge of the firms, and that they could not claim to hold the iron as *bona fide* purchasers without notice.

The secretary of the navy is authorized under the act of congress (14 U. S. Stat. at Large, 64, § 1), to appoint a firm in London to act as his agent in paying drafts drawn by naval officers, and he may, when necessary, exact and receive all such securities as he can obtain to protect his department against loss by reason of the apprehended insolvency of such firm.

APPEAL from orders made at the Special Term, continuing injunction orders during the pendency of the action.

4	529
72	70
8	529
82	70
4	529
146a	124
4	529
27ap	153
4h	529
48ad	171

Thomas H. Hubbard, for the defendants Moorhead and others. Bondholders must seek their remedies through the trustees who represent them. (*Coal Co. v. Blatchford*, 11 Wallace, 172, 177.) The First Division Company had the right to hold and use, for the construction of the extension roads, all the property leased to it by the St. Paul Company (which included all the mortgaged property), and all the proceeds of the \$15,000,000 issue of bonds, until there should be a default in paying either the principal or interest of said bonds. It also had the right, under the mortgage, to sell equipment, machinery and implements covered by the mortgage, but unfit or unnecessary for use. By the laws of Minnesota, a mortgage of real estate is a mere security for and an incident to the debt; the mortgagee has no conveyable interest in the mortgaged premises until foreclosure sale, or, at least, until entry after condition broken. (*Hill v. Edwards*, 11 Minn., 22, 29; *Greve v. Coffin*, 14 id., 345, 353; *Everest v. Ferris*, 16 id., 26.) The Supreme Court of the United States has held that, when such is the rule of the State courts, a mortgage given by a railroad company to secure its bonds only confers upon the mortgagee or the bondholders a right to proceed against the mortgaged property upon a given contingency, but that, meantime, the mortgaged property belongs entirely to the company. (*The Cleveland and Ashtabula Railroad Company v. Commonwealth of Penn.*, Int. Rev. Rec. of Jan. 31st, 1874, 37, 38; see, also, *Pierce v. Emery*, 32 N. H., 484, 514.) If the mortgage, so far as it relates to the iron, is treated as a chattel mortgage, the plaintiffs' position would be no stronger. At best, they would then be mortgagees of chattels in possession of the mortgagor, before default, and under a mortgage reserving to the mortgagor a power of sale. (*Gates v. Smith*, 2 Minn., 31, 32; *Chopard v. Bayard*, 4 id., 533, 540, 541.)

Samuel Boardman, for the defendants Woodruff and Robinson.

Edmund H. Smith and *George Bliss*, for the defendant Cutter. The agents of the government acted in good faith, and without knowledge of any alleged lien or conflicting claim upon the iron. The indicia of title, the warehouse receipts, were negotiable, and contained nothing to give the agents of the government ground

for suspicion or knowledge of any irregularities in their transfer. (Laws N. Y., 1830, ch. 179, § 3; Laws N. Y., 1858, ch. 326, § 6; *Rawls v. Deshler*, 3 Keyes, 572; *Dows v. Green*, 24 N. Y., 638; *Western Trans. Co. v. Marshall*, 6 Abb. [N. S.], 280.) The deposit of public money with Jay Cooke, McCulloch & Co., to secure the safety of which the secretary obtained title to the iron, was unquestionably within the official power and duty of the executive officer of the government, and expressly provided for by the following statutes, viz.: Section 1, act of 14th June, 1866 (14 Stat. at Large, 64); section 3620, Revised Statutes United States; section 1, act of 31st January, 1823 (3 Stat. at Large, 723); section 3648, Revised Statutes United States. The secretary of the navy has supervision of and control over the disposition of the public moneys appropriated to the use of the navy department. (2 Stat. at Large, 535; 3 id., 567, 689.) The moneys being, therefore, legally deposited by the secretary for the use and advantage of the government, and being in no sense a loan to or deposit for the use or advantage of the firm of Jay Cooke, McCulloch & Co., it was undoubtedly the duty of the secretary to take all means possible to ensure its safety. (*United States v. Tingey*, 4 Pet., 128; see, also, *Dugan v. United States*, 3 Wheat., 172; *United States v. Bradley*, 10 Pet., 359; *United States v. Linn*, 15 id., 290; *Dixon v. United States*, 1 Brock., 177; *United States v. Maurice*, 2 id., 96; *United States v. Admrs. of Lane*, 3 McLean, 365; *Neilson v. Lagon*, 12 How. [U. S.], 98; *United States v. Mynderse*, 11 Blatch., 1; *United States v. Hodson*, 10 Wall., 395.) The title to the iron having been properly acquired by the secretary of the navy, the court cannot interfere with or restrain his disposition of it, as is indirectly, but no less practically, sought to be done by the injunction in this case. The court will not do indirectly what it cannot do directly. (*State of Mississippi v. Johnson*, 4 Wall., 475; *McIntyre v. Wood*, 7 Cranch, 504; *Murbury v. Madison*, 1 id., 137; *McClung v. Sullivan*, 2 Wheat., 369; *Kendall v. United States*, 12 Pet., 524; *Decatur v. Paulding*, 14 id., 497; *Comr. of Patents v. Whiteley*, 4 Wall., 532; and see 13 Pet., 608.) The duties of heads of departments, of whom the secretary of the treasury is one, are mainly judicial and discretionary, rather than ministerial. (*Decatur*

FIRST DEPARTMENT, MAY TERM, 1875.

v. *Paulling*, *supra*; *Brasher v. Mason*, 6 How. [U. S.], 101.) No State court has power to issue the writ of mandamus, and, by parity of reasoning, the writ of injunction, against an officer of the United States for any purpose whatever. His conduct can only be controlled by the power that created him; and because congress has not seen fit to confer the power to issue the writ upon the federal courts, it cannot be considered a reserved power of the States. (*McClury v. Silliman*, 6 Wheat., 518; *Kendall v. United States*, 12 Pet., 617; 13 id., 608; *Territory v. Lockwood*, 3 Wall., 239; *Ladd v. Tudor*, 3 Wood. & M., 332.)

Evarts, Southmayd & Choate, for the plaintiffs.

DANIELS, J.:

This action has been brought by the owners of mortgage bonds, issued by a corporation known as the First Division of the St. Paul and Pacific Railroad Company, secured by a mortgage executed to three trustees by another corporation called The St. Paul and Pacific Railroad Company, to prevent the improper diversion and misappropriation of property asserted to have become subject to the mortgage. This property consisted of iron rails suitable for constructing the track of the railroad, and purchased and received for that purpose. That was sufficient between the company and the bondholders to render it subject to the mortgage executed for their security; for it was provided in the mortgage, that "any and all rolling stock, equipment and materials whatsoever, which, pursuant" to a lease executed by the St. Paul and Pacific Railroad Company to the other company, "or otherwise, shall or may be acquired or furnished for the use of the said railroads, or either of them, by the said First Division of the St. Paul and Pacific Railroad Company, shall, by the mere acquisition thereof for such use, become and be part and parcel of the property hereinbefore granted, and become and be subject in all respects to the lien and operation thereof, in the same manner and with the same effect as if such property had been acquired by the said party of the first part [which was the St. Paul and Pacific Railroad Company], for such use;" and it gave them a clear equitable right to have these rails devoted to the purpose for which they had been purchased by the

First Division Railroad Company, which would have materially enhanced the value of their security as bondholders. This iron was not applied to that object, but, under a resolution adopted by the board of directors of the company whose duty it was to appropriate it solely to that end, William G. Moorhead, who seems to have been the acting man of the three trustees to whom the mortgage for the benefit and security of the bondholders was given, and who was also the construction agent of the company, was authorized to pledge, hypothecate, sell or dispose of the iron rails of the company, then in New York or elsewhere, or afterward to arrive, for such sums and on such terms, as were in his judgment best for the interest of the company, for the purpose of raising the money necessary to meet past and future estimates for construction account of the extensions of the railroads, and for duties, freights and advances on the same account; and Moorhead, under and pursuant to that authority, disposed of the railroad iron in controversy in the present action. This was in plain violation of the terms of the mortgage, and how far it might be excused by the urgent financial necessities of the company, when done in entire good faith, it is not necessary at the present time to inquire, for, although it is claimed in the defendants' pleadings and affidavits, that an emergency of that nature existed, the facts are not sufficiently before the court to justify a determination on that subject in their favor. To warrant such a diversion of the property solemnly appropriated to the construction of the road, and the increase of the security of those persons who advanced their money to build it, would certainly require the establishment of an urgent and clear necessity that could be financially provided for in no other way; and its existence has not been yet maintained by the papers produced on the part of the defendants. The utmost good faith is required in transactions of this nature, and that can only be made to appear by a minute exhibition of all the facts and circumstances of the case, as distinguished from the general statement relied upon in support of what must be considered, under ordinary circumstances, a misappropriation of the company's property. As these iron rails were acquired after the mortgage was made and delivered, they became a part of the security only in equity against persons buying them with notice of the facts, or without parting with value for them. To that

extent the bondholders had an equitable right that they should be used only for the purpose for which they had been bought, and that was to construct the railroad track with them. That was not done; but, by the confederation and collusion of the company and the acting trustee, whose duty it certainly was to protect the security he had taken for the bondholders to the utmost of his ability, the rails were disposed of to other persons, and large amounts of money raised from their sale and hypothecation. If the company could not have raised the money to meet its pressing wants in any other way, no convincing reason exists for believing that the very large amounts obtained on the iron were needed for that purpose, and the resolution of the directors imposed no such restraint on the power given Moorhead to pledge, sell or dispose of it. He was not merely authorized to sell such as might prove absolutely necessary to meet the company's financial wants, but he was empowered to go much further than that, and, without restraint, sell all the iron rails of the company in New York or elsewhere, including those afterward to arrive. The sales were chiefly made to the firms of Vibbard, Foote & Co., Jay Cooke & Co. and Jay Cooke, McCulloch & Co., and they were all made under the agency, management and authority of Moorhead, acting at the time in the double, and, perhaps, not quite consistent, capacities of construction agent for the company and trustee of the bondholders. As one of the trustees named in the mortgage given to secure the bonds, he was chargeable with, and undoubtedly had complete knowledge of, the provision, already mentioned, which was contained in it, and he consequently knew that it was the right of the bondholders to have the iron used for the sole purpose of constructing the railroad; and the facts warrant the conclusion that he must have understood that to be the case when he made the disposition which he did of the iron now in suit; and having that knowledge and understanding, it invalidated the sales made to Jay Cooke & Co., and to Jay Cooke, McCulloch & Co., because he was a member of both those firms. The fact that he did not directly participate in the active management of the business of those firms, can make no difference in the case. He was one of the partners, and for that reason actual notice to him was constructive notice to his associates. It was his duty to communicate what he knew on these subjects to them, and if he did

not, they, and not innocent third persons, must sustain the consequences resulting from the want of it. (Lindley on Partnership [3d ed.], 304, 305.) They, having such notice, acquired the rails subject to the bondholders' equity to have them applied to the purpose for which they had been originally bought, and that was the construction of the track of the railroad. Those sold to Vibbard Foote & Co., were also subjected to the same equity, for it appeared while they took the nominal title to them, Jay Cooke & Co. actually advanced the money for them, and in the end, all that remained unsold were, by an actual transfer, turned over to the firm of Jay Cooke, McCulloch & Co. But even if the purchase by Vibbard, Foote & Co. could be, and should be, sustained, as having been made in good faith and for a valuable consideration advanced, that right was lost by the sale to Jay Cooke, McCulloch & Co., because Moorhead was a partner in that firm, and his knowledge of the plaintiffs' equity, which would be defeated only by a *bona fide* sale of the iron, prevented himself and the firm of which he was a member from succeeding to any *bona fide* title Vibbard, Foote & Co. might have innocently acquired by advancing their money for it, if they had done so in good faith, and in ignorance of that equity, for the wrongdoer is not allowed to profit by the acquisition of another *bona fide* title, when that has been created by his own misconduct or breach of trust. (1 Story's Eq. Jur. [11th ed.], § 410; *Kennedy v. Daly*, 1 Schoales & Lefroy, 555, 379.) Consequently, when Jay Cooke, McCulloch & Co. received the iron Vibbard, Foote & Co. had on hand, unsold, their title to it was no better than it was to that which had been directly transferred to them by Moorhead, and also to the firm of Jay Cooke & Co. In their hands it was subject to the plaintiffs' equity to have it applied to the construction of the railroad, requiring that it should be devoted to the construction of the road; and whether their advances wholly or partially can be properly reimbursed out of its value, must depend upon circumstances, if they exist, not now fully before the court. For the present purposes of the litigation, it must be concluded, from the knowledge Moorhead must have had, that both the firms of Jay Cooke & Co. and Jay Cooke, McCulloch & Co., held the

iron in their hands subject to the equitable rights of the bondholders under the mortgage.

A portion of the iron, amounting to 1,647 tons, was transferred by Jay Cooke, McCulloch & Co. to the secretary of the navy of the United States, to secure a balance in their hands to his credit. They were the agents at London, through whom drafts were paid, which were properly drawn by naval officers in the service of the United States, in different portions of the world. There was nothing improper in the establishment of this agency. It had been maintained for many years, and was required for the convenient disbursement of funds to be used to meet the expenses of the distant operations of the naval department of the United States government; and it was clearly authorized by the provision made by an act of congress, which declared that: "In places where there is no treasurer or assistant treasurer, the secretary of the treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or in writing authorize the same to be kept in any other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors." (14 U. S. Statutes at Large, 64, § 1.) That seems to have been broad enough to sanction the disbursement of public moneys for the distant uses of the navy through such an agency, as appears by the affidavits produced, to have been maintained at London with the firm of Jay Cooke, McCulloch & Co. And it was not shown to have been established without the sanction or authority of the secretary of the treasury. But whether it did or not, after the public moneys had found their way for legitimate public purposes into their hands, it was entirely lawful and proper for the secretary of the navy to exact and receive all such securities as he could obtain, to protect his department against loss by reason of their apprehended insolvency. And that authorized him to receive a transfer of the 1,647 tons of the iron, and to hold it for his reimbursement, so far as the firm had any interest in it, if any such they may hereafter appear to have, which may prove to be paramount to the present claims of the bondholders. At the time when this transfer was made, the money was

in the hands of Jay Cooke, McCulloch & Co. on deposit. It was a mere debt, therefore, due on call; and in the condition of the affairs of this firm at that time, there seems to have been nothing which the secretary of the navy or any agencies he might employ, could do, which would have resulted in the recovery of the money. He, therefore, relinquished nothing for the transfer he received of the iron. But it was taken as a mere security for a precedent debt, which gave him the same and no better title to it, than that which Jay Cooke, McCulloch & Co. then had themselves; and that, because of Moorhead's knowledge, was subject to the plaintiffs' equity. The other transfer made of the 4,446 tons of the iron, was for a consideration of £100,000 sterling advanced at the time. This was placed in their hands for the same purposes as the preceding deposits, and for that reason it was lawful in its character, although plainly injudicious, because of the financial embarrassments in which the firm of Jay Cooke, McCulloch & Co. were at the time involved. But as it was lawfully made, the secretary had the undoubted right to take a transfer of this iron as its security. And that was evidently done in good faith, believing that Jay Cooke, McCulloch & Co. had a complete title, and a perfect right to transfer the iron. That, at the time of it, was a valid transaction, for it was without notice of the plaintiffs' equity; and if it had been clearly made to appear that the security and debt still remained the same, the injunction should be modified so far as to allow a sale to be made of so much as would be required for the payment of the advance then made. But it was not; and as the deposit was made to meet drafts drawn on the naval department, and payable through its agency in London, the advance may have been greatly reduced, or entirely disbursed, and the right to hold this iron correspondingly diminished, or wholly extinguished. For that reason it is uncertain what interest the secretary of the navy may still retain in this iron. That can be properly ascertained upon a hearing of the cause; and the injunction should not be modified so as to permit a sale by him, until the interest he still has in it, has been legally established. The iron is now within the lawful jurisdiction, and subject to the equitable authority of this court, and that should be maintained for the purpose of securing all the equitable rights which the

plaintiffs and those represented by them may be entitled to in it. The secretary himself is not subject to the jurisdiction or authority of the court, but this iron is found in the hands of other persons who are, and who assert his interest in it for their own protection, in attempting to withhold it from the plaintiffs' claim to it. Having jurisdiction over them, and over the property in their hands, no good reason appears why they should not be restrained from parting with it, until it can be ascertained who may be able to establish the paramount right to it. Presumptively, that is now in the plaintiffs, and that can only be overcome by proof that the advance which was made on the faith of it has not been paid, or that further advances made in good faith on its security are still outstanding. So far as this, as well as the preceding iron may be involved in the present controversy, and the unpaid balances due for iron otherwise sold, the present injunction must be maintained; the ends of justice cannot, certainly, be secured without it. But as to so much iron as was transferred to the New York Guaranty and Indemnity Company, the case is clearly different, for the answer and the affidavits produced in its behalf show a very plain case in its favor. That company advanced its money in good faith, on complete evidence of Moorhead's right to dispose of it as he did, and without either actual or constructive notice of the equity existing in the plaintiffs' favor, and it, therefore, has a clear right to sell the iron pledged to it, for its own reimbursements, as its debt was shown to be overdue. But if any balance should remain, beyond what may be required for that purpose and the payment of interest and necessary expenses, that must be still retained subject to the injunction, until the rights of the other parties to it have been ascertained by means of a trial. That balance, whatever the amount of it may prove to be, was one of the items finally transferred to the secretary of the navy, and his right to receive it is subject to his ability, or that of those who are before the court representing his interests, to show that the moneys advanced on the faith and security of it, still continue to be unpaid.

No doubt can be entertained as to the plaintiffs' right to maintain this action on their own account and for the protection of the interests of others similarly situated. If they could not do so, their rights and interests would be wholly without protection,

for the directors of the company directed the disposition which was made of the iron in violation of the plain terms of the mortgage, and it may, under the circumstances shown by the affidavits, be inferred that the other trustees acquiesced in the acts of Moorhead, to whom the active management of the business appears to have been intrusted by them. They certainly were not shown to have dissented in any way, or to have disapproved of what he did, and it was not even claimed that they were opposed to the disposition he attempted to make of the property. It was highly probable that all were concerned in the execution of the same purpose, and intrusted it to his management to effect it; and when that is the case, the parties ultimately interested are entitled to institute proceedings in their own names for their own protection. (*Watson v. Sutherland*, 5 Wall., 74; *Memphis City v. Dean*, 8 id., 65, 73; *Bute v. Graham*, 1 Kern., 237; *Gray v. New York and Virginia Steamship Co.*, 10 S. C., 383; *Angell & Ames on Corp.* [4th ed.], §§ 391-393.)

The orders should be modified to the extent before suggested, with ten dollars costs, besides disbursements, to the New York Guaranty and Indemnity Company, and affirmed in all other respects, with ten dollars costs, besides disbursements, to the plaintiffs against the other defendants, but with leave to the defendant Cutter to renew the motion to vacate the injunction, so far as it restrained the sale of the iron transferred to secure the advance of the £100,000 sterling, in case that or any considerable portion of the same can be shown to be still unpaid.

DAVIS, P. J., and BRADY, J., concurred.

Ordered accordingly

JOHN WIGGINS, PLAINTIFF IN ERROR, v. THE PEOPLE OF
THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

Grand larceny — evidence of — statements made by third persons — fictitious persons — how shown to be — hearsay.

On the trial of an indictment for grand larceny, alleged to have been committed by means of a trick, by which the owners of the stolen property were induced to send it to fictitious persons, in consequence of which the prisoner feloniously acquired possession of it, the statements of persons of whom a witness for the prosecution inquired as to the existence of the persons to whom such property was directed to be sent, are hearsay, and not proper evidence against the prisoner.

WRIT of error to the Court of General Sessions of the county of New York.

The plaintiff in error was indicted in the Court of General Sessions of New York city, for grand larceny, in October, 1874, was tried, before the city judge and a jury on the 13th of November, 1874, and was convicted and sentenced to the State prison for the term of five years.

On or about the 6th of October, 1874, Mr. Edmund D. Bradshaw, a commission merchant and resident of Alton, Wayne county, in this State, received through the mail, in regular order, a letter purporting to have been sent by the firm of "A. A. Greeley & Co.," of Middletown, Connecticut, which letter requested and directed Mr. Bradshaw to forward to the firm of "Peter Y. Clark & Co.," of New London, Connecticut, from 600 to 1,000 pounds of butter, at a price not to exceed thirty-eight cents per pound, and to draw immediately upon "A. A. Greeley & Co.," at sight, for the amount shipped. In obedience to the order, and in compliance therewith, Mr. Bradshaw did ship to the firm of Peter Y. Clark & Co., New London, Connecticut, about the sixth of October, fifteen tubs and one firkin, containing in all over 800 pounds. The butter was at once returned from New London to the city of New York, and then went into the prisoner's possession. It was claimed by the prosecution that the prisoner had previously obtained the butter by applying for its purchase in the name of

Peter Y. Clark & Co., and certain evidence was given on the trial of conversations had with a witness for the prosecution, tending to show that the firm named as purchaser of the property, and the drawee of the draft were fictitious.

John O. Mott, for the plaintiff in error. The court erred in admitting the evidence of the witness Bradshaw. This evidence was mere hearsay, and was clearly inadmissible. (1 Greenl. Ev. [12th ed.], 114, § 99; 1 Phil. Ev. [4th Am. ed.], 169; Roscoe's Crim. Ev. [6th Am. ed.], 22; *Jackson ex dem. The People v. Etz*, 5 Cow., 319, 320; *Woodward v. Raine*, 15 Johns., 493; see 1 Phil. Ev. [4th Am. ed.], 211, § 2.)

Benj. K. Phelps, district attorney, for the people. The evidence was not secondary. (1 Phil. Ev. [Edw. ed.], 469, note 163; 1 Chitty Crim. Law, 567, and cases cited; *Ainsworth v. Greenlee*, 1 Hawks, 190; *Governor v. Roberts*, 2 id., 28; *Executors of Schoenberger v. Hackman*, 37 Penn., 87; *Liebman v. Porkey*, 1 Starkie, 167.) The object was not to prove the truth of the fact by this hearsay evidence, but of the fact that he made the inquiries or search, and, in such cases, it is never necessary to call the persons of whom the inquiries were made. (*Key v. Shaw*, 8 Bing., 320; *Morgan v. Morgan*, 9 id., 359; *Bartlett v. Decreel*, 4 Gray, 111; *Shott v. Streatfield* 1 Moody & Rob., 8; *Whitehead v. Scott*, id., 2; *Phelps v. Foot*, 1 Conn., 387; *Foulks v. Sellway*, 3 Esp., 236; *Jones v. Perry*, 2 id., 482.)

DANIELS, J.:

The prisoner was indicted, tried and convicted of the crime of grand larceny. It was committed by means of a trick or device, by which the owner of the property was induced to send it by express and steamer, from Alton, in Wayne county, to New London, in Connecticut, addressed to Peter Y. Clark & Co., and to draw a sight draft for the amount of the price on A. A. Greeley & Co., at Middletown, in the same State. The butter which was the property sent forward, soon afterward reached New London, from whence it was immediately returned to New York, where it went into the possession of the prisoner. It was the theory of the

prosecution, that he procured the property by feloniously applying for its purchase in the name of Peter Y. Clark & Co., to be paid for by a sight draft on A. A. Greeley & Co., when there were no such firms as those names imported the existence of, but the names were made use of, simply for the purpose of deceiving the seller. The prosecution, to make out the people's case, undertook to prove, as it was important it should, that the firms named as purchasers of the property and drawee of the draft, were fictitious. To prove that, Bradshaw, the complaining witness, was subjected to an extended examination. He sent the property forward to New London, early in October, 1874, and the trial was had on the thirteenth of November following. The day preceding the trial he went to Middletown and New London, and from various inquiries then made by him, ascertained that neither of these firms existed, either at that time, or when the butter was ordered of him; and the prosecution proposed and was allowed to prove these facts, by showing the inquiries which had been made, and the information received by means of them. The important circumstance to be shown in the case was, that these firms did not exist at the time when the property was ordered and sent forward, and for the purpose of establishing it, the witness was allowed to state the inquiries made by him, and the answers secured, both as to the day preceding the trial, and the time when the butter was ordered. The prisoner's counsel objected to the questions propounded to the witness in order to elicit this proof, and a number of exceptions were taken to the rulings made upon them by the court. He finally asked the court to allow him to renew the objections previously made to the conversations between the witness and the persons he conversed with in Connecticut. The court in response stated that he should be considered as objecting and excepting to everything, and with that announcement the witness proceeded with his relation of what had transpired. In the course of it he was asked whether he limited the inquiries made at Middletown to the time of the butter transaction, and answered, that he asked if there was or had been such a firm. He was also asked for the result, and stated it to be, that there was no such firm, and had not been, as A. A. Greeley & Co., at Middletown. It is unnecessary to discuss the proposition, whether an exception taken in this manner will present the point

of the admissibility of the evidence given, though it probably would under the circumstances which existed when it was made. For the same point was specifically raised upon the proof which was offered and received concerning the inquiries made in New London. The witness mentioned several persons of whom he had there inquired concerning the existence of the firm of Peter Y. Clark & Co., and stated that they all gave him but one answer, which was, that there was no such firm there, and never had been, as Peter Y. Clark & Co. The court then remarked that this was admissible, and the prisoner's counsel excepted to the decision. The question is therefore presented, whether the answers given to the questions propounded near the middle of November, could be lawfully and properly received as competent evidence to prove that either one or both of these firms did not exist in the early part of the preceding October. The facts to be proven were that neither did exist at that time, and all the information the witness endeavored to obtain, and the statements he repeated in the evidence given by him, were in support of that conclusion. And the evidence given by the witness as proof of these facts, was not his own observations or knowledge, but simply the unsworn statements and reports of other persons, who were not before the court, and could not be examined or cross-examined to determine the accuracy of what they had related. To allow evidence of that description as proof of material facts required to be established to sustain a criminal prosecution, would be extremely unjust and dangerous to the accused. It would subject him to a trial by witnesses not confronted by him, permitted to give their evidence without even the semblance of an oath or affirmation. The important inquiry in the case was, whether what the persons stated to Bradshaw was true; not whether he truthfully repeated what they had said to him. If it was, then the fact was as the prosecution claimed it to be, and the substantial means for its determination consisted of unsworn statements made in answer to his questions. It was a trial of the accused upon what the law denominates hearsay evidence, which, though admissible for certain exceptional purposes, in controversies affecting certain notorious public interests, and in some other cases, has always been rejected as proof of material and particular facts capable of being proved by the positive evidence

of persons having actual knowledge on the subject. (1 Greenl. on Ev. [12th ed.], § 99; *Queen v. Hepburn*, 7 Cranch, 290, 295; Roscoe on Crim. Ev. [6th ed.], 268; *Jackson v. Etz*, 5 Cowen, 314, 319, 320.)

Cases have been referred to in support of the ruling made at the trial, as at least countenancing the course there adopted. But a brief reference to them will render it entirely manifest that they do no such thing. In *Foulke v. Selway* (3 Esp., 236), the reports allowed to be shown concerned the plaintiff's character, which the law uniformly permits to be proved substantially in that way. This forms a well established exception to the general rule. In *Jones v. Perry* (2 id., 482), the truth of the rumors that the dog was mad was not important. It was the fact of their existence which alone was material; and where that is the case they may be proved like any other circumstance involved in controversy. They influenced the conduct of the party, and whether true or false the effect upon him would be the same, while in the present case the truth of the reports, and not their mere existence, was the important thing to be shown. *Morgan v. Morgan* (9 Bing., 359), is a case included in the same principle, and so is *Bartlett v. Decreet* (4 Gray, 111). The inquiry was, whether the statements in the one case, and the repute in the others, existed; not whether they were true or untrue. Neither of these authorities lends the least support to the ruling by which the evidence referred to was received in the present case, and in view of the clearly defined and well established rule on this subject, by which hearsay evidence, as proof of facts which can be otherwise readily established, is commonly rejected, there is not the least probability that any well considered case sustaining it can be found. The accused may very well be, and probably is, guilty of obtaining the property mentioned in the indictment, by criminal means. But, even if that be the case, he can only be lawfully convicted of the offense by legal evidence. That was not done in this case, and the judgment should therefore be reversed and a new trial ordered.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, and new trial ordered.

GEORGE MOORE, PLAINTIFF, v. THE MAYOR, ETC., OF
THE CITY OF NEW YORK, DEFENDANT.

*Chap. 446, Laws of 1857—effect on contract of failure to publish resolution—
Ratification.*

This action was brought to recover the amount due upon a contract, the resolution authorizing the making of which had not been published as required by section 7 of chapter 446, Laws of 1857, before its adoption by the common council of the city of New York. *Held*, that the contract was void, and that the plaintiff was not entitled to recover.

The work provided for by the contract was performed and partially paid for by the city. *Held*, that these acts did not constitute a ratification of the contract by the city; they were the acts of its officers alone, who could bind it only by observing the requirements of the law affecting the proceedings.

MOTION by defendant for a new trial, on exceptions ordered to be heard at the General Term in the first instance, after a verdict in favor of the plaintiff directed by the court. The action was brought upon a contract for paving, etc., in the city of New York.

John E. Parsons, for the plaintiff. The failure to publish the ordinance in the *Leader*, one of the designated corporation papers, did not invalidate the contract. The work has been done, and has been used by the city, and there has been the most complete ratification. Ratification may be inferred from acquiescence, after knowledge of all the material facts, or from acts inconsistent with any other supposition. (Dillon on Municipal Corporations, § 385; *Peterson v. The Mayor, etc.*, 17 N. Y., 449, 453; *Hodges v. Buffalo*, 2 Den., 110; *People v. Flagg*, 17 N. Y., 584; *Brady v. The Mayor, etc.*, 20 id., 312.) The only limitation upon the power to ratify is, that an act that is in violation of a direct statutory prohibition, of which the parties concerned are required to take notice, cannot be made valid by subsequent ratification. (*Sprague v. Birdsall*, 2 Cow., 419; *People v. Laimbeer*, 5 Den., 9; *McKeen v. Delaney*, 5 Cranch, 32; 1 Serg. & Rawle, 106.) All these matters were, from their nature, within the cognizance of the corporation officers; and not only is it reasonable that the corporation shall be held responsible for their neglect when it seeks to impose lia-

bility upon third persons; but the principle applies, that they who seek to take advantage of a statutory provision must show exact compliance with its requirements. (*Sharp v. Speir*, 4 Hill, 76; *In re Douglas*, 46 N. Y., 42; *Stetson v. Kempton*, 13 Mass., 272; Smith on Statutes, 789.)

D. J. Dean, for the defendant.

DANIELS, J. :

The plaintiff recovered a verdict, by the direction of the court, for the balance unpaid upon a contract made with Robert Jardine, for regulating and paving with stone blocks, Eighth avenue from Forty-second to Fifty-eighth streets. The contract was executed by Darragh and Craven, on the part of the defendant, and it was entered into under the terms of a resolution adopted by the boards of councilmen and aldermen of the city, and approved by the mayor, on the 22d day of May, 1866. This resolution provided for the improvement, at the expense of the city, to be reimbursed by an assessment upon the property benefited by it. The work was afterward performed, and the contract for it ultimately assigned to the plaintiff, who claimed the balance appearing unpaid. Various objections were made during the progress of the trial, to his right to recover, which were overruled by the court, and the defendant duly excepted. Among them was the objection, that the resolution authorizing the improvement was not published in all the newspapers shown to be employed by the corporation, as was required by law; and for that reason it, as well as all the proceedings taken under it, were claimed to be unlawful and void.

The defendant gave evidence directly tending to prove the fact, that in the *Leader*, which was one of the newspapers then employed by the corporation, pursuant to section 2 of chapter 227 of the Laws of 1863, and of which notice was given in that year to the board of aldermen, the publication was not made. And to the sufficiency of such proof no objection was made. On the other hand, it was assumed, as establishing the fact, on the argument, by both the learned counsel engaged in the case, that this omission to publish the resolution had been satisfactorily shown.

The court overruled the objection taken to the validity of the

contract for the want of this publication, and the counsel for the defendant duly excepted to the decision made. No authority beyond the resolution was either shown or asserted for making the improvement. Upon that all the subsequent proceedings were taken, and its legality would therefore seem to be essential for their validity. It was by means of its provisions alone that the work was authorized, and the city bound for the payment of the expenses. And if that were unlawful, no power appeared to exist for binding the defendant to the performance of a contract deriving its obligations solely from that source. The entire proceeding was wholly statutory; and, by a well settled rule, applicable to all such cases, it was essential that the course prescribed in the statute should be followed, in order to render it valid or effectual. (*Sharp v. Speir*, 4 Hill, 76; *Litchfield v. Vernon*, 41 N. Y., 123.)

The statute requiring the publication, provided that "all resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of public moneys, or the taxing or assessing the citizens of the city, shall be published immediately after the adjournment of the board, under the authority of the board, in all the newspapers employed by the corporation, and shall not be passed, or adopted, until after such notice has been published at least two days." (Laws of 1857, vol. 1, 875, § 7.)

It so far restrained the powers of the board, that no resolution included within the terms used, could be lawfully adopted until after the publication required should be made. Without that no authority existed for the adoption of the resolution. And if adopted in form, the omission to publish it as the statute directed, necessarily deprived it of all the force and effect which it would otherwise possess. It would be a simple nullity, and all the proceedings based upon it inoperative. And that, in substance, was held to be the effect of such omission in the cases of *Douglass* (46 N. Y., 42) and *Astor* (50 id., 363). It is true that the decisions made in these cases did not consider the effect of a failure to publish upon a contract entered into for the improvement intended to be made under such a resolution. But they very plainly held not only the resolution adopted without publication in one of the newspapers to be void, but in addition to that the assessment under

it for the purpose of paying the expenses of the improvement, was declared to be equally as ineffectual. And it would seem to follow logically from those conclusions, that the contract entered into and performed pursuant to, and under the exclusive authority of such a resolution, must be equally without any binding effect upon the parties formally entering into it.

The resolution is the foundation upon which the validity of the contract is necessarily dependent, and when that proves to be unlawful, the proceedings following and contemplated by it, must be affected by the same infirmity. This consequence has repeatedly been held to follow the omission to comply with other statutory provisions prescribing the manner in which contracts shall be made for the performance of public work. (*Brady v. Mayor, etc.*, 2 Bosw., 173; 20 N. Y., 312; *Haughwout v. Mayor, etc.*, 2 Abb. Ct. of App. Dec., 345; *Donovan v. Mayor, etc.*, 33 N. Y., 291.)

In general terms, the principle which has been held applicable to all such cases, is, that "if the charter or act of incorporation prescribe the mode in which the officers or agents of a corporation must act or contract, to render their acts or contracts obligatory on the corporation, that mode must be strictly pursued. The act of incorporation is an enabling act; it gives the body corporate all the power it possesses; it enables it to contract, and when it prescribes the mode of contracting, that mode must be observed, or the instrument no more creates a contract than if the body had never been incorporated." (Angell & Ames on Corp. [8th ed.], 283, § 291.) And no good reason appears to exist for excluding this case from its effect.

A contract made by an agent, as the officers of a municipal corporation most surely are, to be binding on the principal, must be entered into under and by virtue of some actual authority. Where that exists, the principal may in some cases be bound, even though it may be transcended by the agent in entering into the obligation. But even in those cases the agent must at least appear to be acting under the apparent authority of the principal. If no authority whatever exists, the latter will not be bound, although the agent may succeed in inducing the belief in the mind of the other contracting party, that he possesses the power to enter into the agreement designed to be made, unless the principal has, by his own

conduct, in some manner rendered himself chargeable with the consequences of the deception.

In this case the defendant did nothing to induce the belief that its officers were empowered to enter into the contract forming the foundation of the claim made by the plaintiff. They acted under specific laws providing the course they should pursue to render their acts binding upon the city. They were special agents, acting within the limits of public and well defined authority, having no power to bind the body represented by them in any other way. And persons dealing with them were bound to take notice of the restraints and disabilities imposed upon them. If they were not, the most stringent acts and provisions could be completely nullified and disregarded by persons designed to be controlled by means of them.

The restraints imposed upon the powers of the officers of the city, have been created for the public safety and protection. And this court has no right to hold their acts to be operative and valid, when they have been performed in such a manner as to violate statutory provisions defining the only course which can lawfully be pursued to give them that character. The officers may bind themselves in favor of persons innocently acting upon the evidence of their supposed authority, but they will fail to render their acts obligatory upon the body proposed to be represented, and in no way participating in the creation or approval of the false appearances exhibited. The resolution was adopted in violation of law, and for that reason it was void, and that fact rendered the contract made for the performance of the work, equally nugatory.

But the learned counsel for the plaintiff contended, that, as the work was actually performed, and partially paid for, the city had so far ratified the contract as to become legally liable upon it. This conclusion, however, is unwarranted by the facts it is dependent upon. For, all that has been done by way of the performance of the agreement on the part of the city, has been the acts of its officers alone. They could bind it in but one way, and that was by observing the requirements of the law affecting the proceeding. If they failed, as they certainly did, to do that, no indirect acts or proceedings of theirs, afterward had, could lawfully supply the omission.

If the contract was not legally made under the circumstances,

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the defendant's officers could not vitalize it by ratification dependent on the partial performance of its terms. They could not accomplish indirectly what the law prohibited from being done directly. (*Haughwout v. Mayor*, 2 Abb. Ct. of App., 345; *Marsh v. Fulton Co.*, 10 Wall., 677.)

It was also insisted that a recovery could be sustained for the reasonable value of the work performed and materials supplied, even though the contract proved not to be binding upon the defendant. But it is unnecessary to consider that position, because no such cause of action was set forth in the complaint, and no proof given in support of it upon the trial. The recovery was allowed upon the contract alone, and as that was erroneous, the exception presented to the decision allowing it was well taken. For that reason, and without considering the other exceptions taken on behalf of the defendant, the verdict should be set aside, and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Motion for new trial granted, costs to abide event.

GUSTAVUS D. DOWS, PLAINTIFF, v. ALMON W. GRISWOLD, DEFENDANT.

Contract induced by fraud—obligations assumed under, cannot be disaffirmed after the fruits of the contract have been enjoyed.

A party alleging fraud by which he has been induced to execute obligations for the payment of money, must act promptly on discovering the fraud, if he intends to rescind the contract which he was induced to enter into by it. He cannot enjoy the fruits of the transaction and then disaffirm it as to his obligations.

The rule is otherwise when the party seeking to rescind has received nothing of value from the other party.

EXCEPTIONS ordered to be heard in the first instance at General Term.

This action was upon a promissory note made by the defendant, dated March 10, 1870, payable September 15, 1870, for \$2,000 in

gold, given in payment for the assignment of a patent obtained by Dows, Clark & Van Winkle, in France, on the 17th day of June, 1867, for improvements in the manufacture of iced beverages. The facts are stated in the opinion.

Sidney S. Harris, for the plaintiff.

A. J. Vanderpoel, for the defendant.

DANIELS, J. :

This action was brought to recover the amount due upon a promissory note, made by the defendant on the 10th day of March, 1870, payable to the order of William H. Dickinson, for the sum of \$2,000 in gold, on the fifteenth day of the following September, and indorsed to the plaintiff. A verdict was directed for the amount unpaid, to which direction the defendant excepted, and the exception was ordered to be first heard at the General Term, and judgment in the mean time was suspended. The consideration of the note was the sale of an interest in a French patent for the manufacture of iced beverages; and it was previously owned by the firm of Dows, Clark & Van Winkle, of which the plaintiff was a member. The laws of France provided that the transfer, in whole or in part, of a patent, could only be effected by a notarial deed, after payment of the tax imposed; and that no transfer should be valid as regards a third party, before it had been registered at the secretary's office of the prefecture of the department in which the deed had been executed. The tax imposed upon a patent was 100 francs for each year of its continuance, for a period not exceeding fifteen years, and the patent in question was issued for that entire period. The law regulating the mode of transferring patents, required the payment of what was termed the whole tax, to render the transfer effectual; and it is contended on the defendant's behalf, that as the whole of the tax for the period over which the patent could be extended by its payment, was not paid, the transfer was void, and the note given by him was without consideration. No authority was referred to by which it was held that the entire tax for the whole period over which the patent could be extended, was what was meant by the whole tax required

to be paid as a pre-requisite to the validity of a transfer; and in view of the language used in the law, such a construction would not be well warranted by its terms. It is true that the transfer could only be made after the payment of the whole tax prescribed by the article referred to. But the payment required by that article was simply yearly installments of 100 francs each year; and the patent was forfeited only by allowing one year to elapse without such payment. It was, substantially, a tax each year for the continued or yearly use and enjoyment of the patent; and it could not have been designed to require prepayment for every year through which the patent would be extended, as a condition to the legal validity of an assignment. The provision applied, in terms, to partial as well as entire transfer; to one for a year as well as to one for fifteen years; and the supposition would be unreasonable in the extreme, that the law designed that neither transfer could be made without the prepayment of the whole tax, payable during the entire life of the patent. It would impose an unjust restraint upon the privilege secured by another section of the law, declaring that every patentee may transfer the whole, or part of the proprietorship of his patent; and also be inconsistent with the provision requiring payment of the tax only in yearly installments of 100 francs. What the act declared should be done in this respect to render the transfer effectual, was payment of the whole tax as it was prescribed by article 4; and that was a gross tax on a patent for fifteen years, of 1,500 francs, payable in sums of 100 francs each year. It was a compliance with this article which was rendered necessary; and that could be done by making payments of the yearly installments as they matured. Payment in that manner appeared, from the evidence, to have been made by the attorney of Dows, Clark & Van Winkle before 1870, and for that year by themselves. This was shown by Mr. Bliss, the defendant's partner. He stated that he learned in the presence of Van Winkle that the lawyer had paid the annual tax of 100 francs up to that time; that Dows, Clark & Van Winkle continued to pay it while the witness was in Paris, and he understood that they paid it for the year 1870. This he stated was the information secured by him in an investigation made to ascertain whether the taxes had been paid, which were necessary, prior to the transfer of the patent, and

no question was made but that it was entirely reliable and truthful. There was no foundation whatever, therefore, for the support of the objection that a compliance with this provision of the French law had not been shown in the case. The first transfer was made of the entire patent to the defendant, and William R. Bliss and William F. Fowle. It was executed by each member of the firm of Dows, Clark & Van Winkle, the patentees, and afterward properly attested before notaries; and it seemed to conform in all respects to what was required to render it complete by the terms of the French law. For that, and certain apparatus and fixtures required for the manufacture and sale of the patented article, which had been previously transferred by the patentee to William F. Fowle, the defendant made, and Fowle & Co. indorsed, his notes for the sum of 75,000 francs, and delivered them to Dows, Clark & Van Winkle. The apparatus and fixtures were then transferred by Fowle to the firm of Fowle & Co., which consisted of the defendant, Bliss and Fowle, and business was commenced by that firm in Paris. After it had continued for a short time, it turned out that Fowle was insolvent, and his interest in the property was seized for the payment of his debts. For that reason, an assignment of his interest in the patent was taken by his copartners, and they surrendered the instrument, transferring the patent back to the patentees, and took from them another, by which a transfer of three undivided fourths was intended to be made, with an agreement for the transfer of the other one-fourth when they should be repaid the moneys they agreed to advance to redeem the property of the firm from its seizure for the debts of Fowle. The instrument by which the transfer was designed to be made, was executed by Clark and Van Winkle, and properly attested as to them before a notary. They, also, as the attorneys in fact of Dows, each subscribed his name to it. But as they were not empowered to do that by any written authority, the notarial attestation of his execution of it could not be made. In order to provide for supplying this defect, an agreement was entered into by his copartners in their own names, and in his name by them as his attorneys, that he should ratify, by his own signature and seal, the acts of his partners in making both the agreement and the transfer. These instruments were dated on the 6th of April, 1869, and for the transfer designed

to be made, the defendant and Bliss were to pay 10,000 francs less than the price previously agreed upon for the patent, and they were to have the remaining fourth by reimbursing the amount required to be advanced to release the apparatus and fixtures, in paying the debts owing by Fowle, for which they had been seized. The agreement contained a further stipulation that the patentees should, within thirty days, satisfy and remove any attachment, judgment or lien upon the interest of the plaintiff in the patent. But as it appeared to be affected by nothing of that nature, it will be unnecessary to consider this clause in the disposition which should be made of the case.

In the new arrangement made with the defendant and Bliss, it was apparently understood that the old notes made by the defendant, and indorsed by Fowle & Co., in part payment of the price of the patent, as it was at first transferred, should, so far as they were outstanding, with the exception of two of them, be retired and surrendered, and new notes taken for the balance, payable to the patentees. One of the old notes was divided and afterward paid, and the other was also paid. After the two notes were given for the divided note, and about the 2d of March, 1870, the plaintiff applied to the defendant for the new notes. But he declined to give them until the plaintiff executed the assignment which his partners had made for the three-fourth interests in the patent. That, he affirmed, he had already done; and, in reliance on the truth of that statement, the defendant gave the note in suit, and three more for similar amounts, and another for over \$15,000. This statement afterward turned out to be untrue, and for that reason the defendant objects that he should not be held liable for the payment of the note on which the verdict was directed. Why the plaintiff should have falsely made this statement does not appear. By the new arrangement which was consummated in consequence of it, he gained nothing. For he surrendered to the defendant the old notes which the new ones were made to replace, and deducted 10,000 francs from the amount of the preceding indebtedness; and his firm undertook to advance the amount necessary to relieve the apparatus and fixtures from the custody of the law, and surrender the other fourth of the patent when that should be repaid. While the statement was a fraudulent one, no substantial advantage was

derived from it by either the plaintiff or his firm. The assignment of three-fourths was not operative as an actual transfer, without the execution of it by the plaintiff. But notwithstanding that, the defendant and Bliss transacted and carried on business under it, and do not seem to have been deprived of any advantage which the completion of the instrument would have secured for them. It is true they could not sell rights under the patent with only this defective transfer. But it is equally so, that no instance was mentioned in which a sale could have been made, if the instrument had been completed by the formal execution of it by the plaintiff.

The first objection urged against the recovery on the failure of the plaintiff to properly execute the transfer, is, that the right to the purchase-price was conditional on its performance. But the agreement which was made was not in that form. It contained a guarantee that the plaintiff should ratify both the assignment and the agreement by his own signature and seal, and he had no lawful right to the notes which were given until that had been done. But he did obtain them, and carried out the residue of the understanding, and the defendant and Bliss afterward continued their business under the patent. The notes imposed upon the defendant, by their form, an unconditional obligation to pay. The defendant could undoubtedly have returned what he had received, and annulled the transaction, on account of the plaintiff's failure to execute the transfer, as soon as he discovered that to be the fact. But he did not do that; on the contrary, he availed himself of the advantages designed to be provided for his firm by the assignment, in the same manner as though its execution had been unexceptionably complete. After doing that, he could not consistently resist payment of his notes by reason of the plaintiff's non-performance.

The second objection urged in behalf of the defendant on this part of the case is, that his obligation was fraudulently procured, and for that reason cannot be enforced by legal proceedings. But the same difficulty stands in the way of the success of this objection, which disabled him from rescinding because of the plaintiff's failure to perform the agreement. He has voluntarily retained and enjoyed the benefits designed to be secured by means of the transaction. The consideration of the notes was the purchase-price of the interest expected to be acquired in the patent — not simply the

execution of the assignment and agreement by the plaintiff—and that, the defendant and his partner enjoyed until they discontinued their business and Mr. Bliss left Paris. That was done not because the plaintiff failed to execute the instrument, but substantially because the business proved unprofitable, and appeared unpromising. His partners had offered to have the plaintiff execute the assignment upon its being sent by Mr. Bliss to London for that purpose. He not only failed to send it, but omitted to produce it for execution when he had it in his possession, in London, where that could have been, and probably would have been, done at once, if it had been requested. Instead of endeavoring to have the execution completed, the instrument was retained, and all the business which could be done, was performed under the patent it was designed to transfer. After that, the right to rescind and resist payment of the note on account of the fraud, was extinguished. The defendant's partner, Bliss, at all times knew of the incomplete nature of the assignment, and his conduct in the business was binding upon the defendant. The rule is well settled, which requires the innocent party to act promptly on the discovery of the fraud, where he intends to rescind, and in that way discharge himself from the obligation he may have been deceived in creating. He cannot affirm the transaction by enjoying its fruits, and disaffirm it by annulling his obligation. The law requires him to do one or the other; he cannot do both. (*Cobb v. Hatfield*, 46 N. Y., 533.) A different rule prevails where the party endeavoring to rescind has received nothing of value from the other party. (*Nichols v. Michael*, 23 N. Y., 264.) There it is sufficient to surrender any worthless instrument which may have been received from the party guilty of the fraud, at the trial. But this is not a case of that description, for the defendant and his partner not only had the use of the patent in their business, and to that extent extinguished its existence, but in addition to that he sold an eighth interest in it to General Smalley. These were things he did not and could not surrender, when, for the first time, he offered to return the interest proposed to be assigned, after the present action was commenced. It is claimed, in behalf of the defendant, that all he or his partner had received, was an instrument without the least effect upon the patent, and for that

reason the offer to return it after the action was commenced, was sufficient. This position depends upon the law of France, already referred to, requiring the transfer to be by a notarial deed; and if the defendant is entirely right in taking it, then the entire interest first assigned to himself, Bliss and Fowle, still remained the property of the firm constituted by himself and Bliss. That was transferred by a notarial deed, and no reason appears for questioning its validity. Fowle transferred his interest under it to the defendant and Bliss. But all they did to divest themselves of it was to return the assignment to the plaintiff and his partners, which was not a transfer of the patent as the law of France required it should be made. To comply with what that prescribed, a notarial deed from the defendant and Bliss was necessary; and that was never made or executed. If the second instrument was invalid for want of the plaintiff's signature, the first surely remained in force; and that was sufficient to support the defendant's obligation to pay the purchase-price. Even if a complete rescission of the second transaction could have been accomplished, the defendant's condition would have been wholly unimproved; for that would have required a return of the old notes, on which a more extended liability existed against him. Evidence was given tending to show that he was induced to enter into that by means of fraudulent representations made by Fowle, and assented to and confirmed by the plaintiff. But even if that fact was proven, he had gone too far, after its discovery, to rescind it for that reason. He stated to the plaintiff that he wanted to throw up the whole thing, that he had been swindled in the matter from the very beginning, and thought him privy to Fowle's misrepresentations, as there were many points he must certainly have known. But instead of doing it, or endeavoring to do it, he continued to hold the assignment and the patent, and carry on the business protected by it. He had his election, if he had been deceived by fraudulent representations, to surrender and return what was received through the transaction produced by it, and repudiate his obligations given upon the faith of their truth, or retain what had been delivered, and thereby affirm what had been done. He chose the latter alternative and pursued it until it was too late for him to recede; the consequence of which was that he rendered himself liable for the payment of his notes. The law

did not impose that burden upon him; he assumed it by his own act; and no authority exists under which he can be relieved from its effect. The motion for a new trial should be denied, and judgment ordered on the verdict in favor of the plaintiff.

DAVIS, P. J., and BRADY, J., concurred.

Ordered accordingly.

IN THE MATTER OF THE PETITION OF LEOPOLD BOHM,
APPELLANT, TO VACATE AN ASSESSMENT.

Chapter 312, Laws of 1874 — power of court to order a reference under — Distinction between power of court to order reference in actions and in special proceedings.

In applications to vacate assessments under chapter 312, Laws of 1874, the court has power to refer the matter to a referee to take and report the testimony to the court.

APPEAL from an order of reference made at Special Term, referring it to a referee to take the proofs in the matter, and report the same to the court.

Irving Ward, for the appellant. The power of reference which the court possesses is derived from legislative enactment, and no authority to refer can exist in any statutory proceeding, unless by express affirmative direction in the statute. (Code, §§ 254, 271, 401; 2 Till. & Shearman, 519; 7 Abb., 70; 12 Abb. Pr. [N. S.], 250; 37 How., 399; 45 Barb., 344; 11 How., 439 [cited 26 Barb., 361]; 6 Abb. [N. S.], 245; 8 Bosw., 701; 1 Sweeney, 352.) The sole authority which the court possesses to entertain an application of this character is derived from the legislature. This proceeding is purely statutory, and the court acquires jurisdiction solely from express statutory enactments; therefore this jurisdiction must be exercised in the exact manner pointed out by the statute. (Laws of 1858, chap. 338; Laws of 1874, chap. 312; 2 Cranch, 127; 19 Barb., 558; 1 Seld., 439; 10 N. Y., 328; 17 id., 383; 18 id., 412; 4 Hill, 76, 92; 2 Denio, 330; 3 id., 599; 2 Barb., 114; 6 id., 611; 15 id., 395; 52 N. Y., 527; 46 id., 42; *In re Phillips*, Ct. of

App., Jan. 1875, MS.; 19 Barb., 649; 35 id., 474; 10 N. Y., 329; 23 id., 286; 1 Burr., 377; 7 T. R., 363; 3 Johns. Cases, 107; 7 Johns., 541; 1 Hill, 130; 2 Kern., 575; 6 Abb. Pr., 162; 3 N. Y., 401; 51 id., 610; 3 id., 511.)

William Barnes, for the respondent.

DANIELS, J. :

The application made in this case was to have an assessment vacated, which had been imposed upon the petitioner's property for the expense of a local improvement. It was by petition, and the court ordered a reference of it for the simple purpose of taking the proofs designed to be given by the parties. The proceeding was provided for by chapter 338, of the Laws of 1858, as amended by chapter 312 of the Laws of 1874. By these acts it is required to be by an application to a judge of the Supreme Court, at Special Term, or in vacation, who shall thereupon, upon due notice to the counsel to the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties. (Laws of 1874, 366, § 1.) And, by section 2 of the same act, an action for that purpose was prohibited. What the law provided for, was therefore a special proceeding, as distinguished from an action. And, for that reason, the cases relied upon by the petitioner's counsel, in which it has been held that actions cannot be referred unless some statute has provided for their reference, can have no application to the present controversy. It is claimed, however, that the act requires the proofs to be taken in open court. But that is clearly a misapprehension. It simply provides that the court shall proceed forthwith to hear the proofs and allegations of the parties, not that they shall be taken as well as heard before the court. How the proofs are to be taken the legislature has not provided. And for that reason they may be taken as that is usually done in similar proceedings. When the petition has been properly presented, jurisdiction is acquired over the case and the parties to it. Both become subject to its practice and authority. And for that reason it may control the proceeding the same as it usually does those of a similar character. Under the preceding practice, applications for relief by petition were usually addressed to the Court

of Chancery, and when proof was required to be taken for the purpose of considering and disposing of them, it was never done in open court, but by a reference to a master; and upon the proof taken before him and his report, the hearing was afterward had. For those purposes this practice still continues. It is only in equity cases, as distinguished from mere summary applications, that the testimony has been required to be taken in like manner as in cases at law. (Art. 6, § 10, Const. of 1846.) And that still allows special proceedings to be controlled and disposed of as they previously had been under the well settled practice of courts of equity. The power was expressly continued by the judiciary act, passed after the adoption of the present Constitution. It provided that, on and after July, 1847, "courts of record may, by an order to be entered in any suit or proceeding at law or in equity, refer any matter *heretofore usually referred to any clerk, master in chancery or referee*, to a clerk of the same court, or to any county judge, or local officer," etc., "*or other suitable person*, in the same manner as references have heretofore been made to any officer or person by any court, and with the same powers as have heretofore been possessed by such officer or person." (3 R. S. [5th ed.], 291, § 49.) That clearly invested this court with all the authority the preceding Court of Chancery had to refer such an application, when it could have been made to that tribunal during its existence. And it included the power exercised over the petitioner's application. Beyond this statutory provision, the court, by virtue of its general powers, has inherent authority to refer summary applications made to it, for the purpose of taking such proof as it may require to enable it to pronounce an intelligent judgment on their merits. It was declared, in the opinion given in *Dwight v. St. John* (25 N. Y., 203) that, without the Code, the court always had the right to refer, to take proofs on matters upon which it desired fuller information before proceeding (*id.*, 205); and no dissent was expressed to the accuracy of this general proposition. The order appealed from should be affirmed, with ten dollars costs, besides disbursements.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, with ten dollars costs, besides disbursements.

MINNIE HAUCK, APPELLANT, v. SAMUEL CRAIGHEAD
AND OTHERS, EXECUTORS, ETC., RESPONDENTS.

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Pleadings — amendment of — when allowed — Variance — when immaterial.

Where reasonable diligence has been shown, and the party for the first time discovers at the trial that the cause of action or defense has been misunderstood, and for that reason improperly alleged in his pleading, an amendment should be allowed, when applied for without unnecessary delay, by way of special motion.

Where, in an action upon contract, the complaint alleged that the plaintiff refused to enter into the contract unless one of the defendants *should indorse such contract* and become responsible for its performance, and upon the trial it appeared that the agreement was that the said defendant should *join in and sign* the same: *held*, that the variance was immaterial and should have been disregarded.

APPEAL from an order made at the Special Term, denying a motion for leave to amend the complaint.

A. C. Fransioli, for the respondents.

Geo. V. N. Baldwin, for the appellant.

DANIELS, J. :

This action was brought for services performed under a contract made for her employment as *prima donna assoluta* for operas and concerts, and for damages for the partial breach of such contract. It was prosecuted against Samuel N. Pike and Lafayette Harrison, as parties jointly liable for its performance. But at the trial the court excluded evidence proposed to be given to establish such liability, because it was not regarded as alleged in the complaint. A juror was thereupon allowed to be withdrawn, to afford the plaintiff an opportunity to move that her complaint should be amended in that respect, but when the motion was made, it was denied, as it is affirmed, on the authority of *Gowdy v. Poullain* (9 S. C. [2 Hun], 218). That case was peculiar in its circumstances, and was not designed to establish the rule, that a pleading could not be amended on motion, when the party applying for leave failed to discover the necessity of the amendment until the cause

came on for trial. Very great laches appeared from the circumstances then before the court, and no very good reason was shown why the plaintiff failed to correctly allege his cause of action in the first instance. It was not one concerning which a party could well be mistaken, without a very great degree of inattention. Where reasonable diligence has been shown, and the party for the first time discovers at the trial that the cause of action or defense has been misunderstood, and for that reason improperly alleged in his pleading, then the true theory of the Code contemplates that an amendment shall be allowed, when applied for without unnecessary delay, by way of special motion. And the authority referred to contains nothing in conflict with this principle. But cases frequently arise where formal and unimportant differences appear in the proof from the allegations made of the facts in the pleadings. No actual necessity for amendment exists in those cases under ordinary circumstances; for neither party can be usually misled to his prejudice by means of such variances. When, however, the fact may be otherwise, there the party alleging it must support it by his affidavit, and then the pleading can only be amended upon such terms as shall be just. But when no such affidavit is made, the variance may be disregarded, and the fact found according to the evidence, or an immediate amendment may be ordered. (Code, §§ 169, 170.) By the provisions made upon this subject, no variance between the allegation contained in a pleading and the proof is to be deemed material, unless it may actually mislead the adverse party to his prejudice. This is a very broad and comprehensive provision, limited only by the restriction, that, when the cause of action or defense, as it may have been alleged, is unproved, not merely in some particular or particulars, but in its entire scope and meaning, then the case shall not be considered one of variance, but a failure of proof. (Id., § 171.) That is the only qualification to which the preceding general provision, requiring mere variances to be disregarded, has been subjected. And it does not include this case, and for that reason cannot control it; for, at most, the allegation of the plaintiff's cause of action was unproved in only one of its particulars. That was as to the manner in which the defendant Pike became a party to the written agreement on which the action was brought. And

it was not made to appear that the defendants were in any respect misled in consequence of it.

The complaint alleged that 'the plaintiff declined to enter into the agreement unless Pike should indorse and become responsible for the performance of it by the defendant Harrison, and that thereupon he promised and agreed that, if the plaintiff would enter into the agreement, he would assume such responsibility and indorse the contract. That she then entered into the agreement with Harrison, and Pike indorsed it, and thereto set his name. The evidence, as the plaintiff's counsel regards it, tended to show that it was agreed that Pike should join in and sign the contract with Harrison, and in that way become responsible with him for its performance, and that he agreed to do so if the plaintiff would enter into the engagement. That she did enter into it, and he joined in it and thereto set his name.

The difference between the allegation and the amendment proposed to render the complaint conformable to this state of the proof, consisted in the mode in which Pike agreed to become bound. The fact that he undertook to bind himself, and the extent of the obligation he was to assume, are identical in each. And the mode he adopted to bind himself is the same in the complaint and the proposed amendment. For by both he was to become responsible for the performance of the contract by Harrison, and did so by setting his name to the contract, the difference consisting in the allegation that he indorsed the contract by setting his name to it, and joined in and signed it, as the amendment proposes it should be alleged. This was altogether too slight to be anything more than an immaterial variance, which could neither have prejudiced nor misled the defendants. The obligation alleged to have been finally assumed by Pike, is precisely the same in both instances. That is, that he undertook to become responsible for the performance of the contract by Harrison. And no difference exists in the manner in which he imposed it upon himself, which, in each case, is stated to have been by setting his name to the written agreement. The fact that he agreed to create the obligation by joining in and signing the agreement, or by indorsing it, is entirely unimportant, as long as he finally did what, in the most favorable statement of the plaintiff's case, he was to have done, which was

to set his name to the contract to bind himself for its performance by Harrison. If that rendered him liable, it was sufficient for all the purposes of the case. If it did not, the preceding agreement that he would join in and sign it, instead of that which was alleged, that he would indorse it, would not render him liable. Whether, in either event, he could be rendered liable by setting his name to the agreement for the purpose of becoming responsible for the performance of its terms by Harrison, it is not now designed to be considered or determined. The pleadings were broad enough to allow all the proof to be given, which could be received under the amendment proposed to be made. (*Hart v. Hudson*, 6 Duer, 294, 307; *Bank of Cooperstown v. Woods*, 28 N. Y., 545.) And that is all the court can be now required to decide.

No harm could have arisen out of the allowance of the amendment, but, strictly considered, there was no necessity for it. And it is much better that unimportant variances of this nature should either be disregarded entirely, or amended at the trial as the Code has provided they may be, than that the parties should be subjected to the labor and delay of a special motion in order to render the pleadings literally accurate in the statement of the cause of action or defense. The system which has been devised is neither obscure nor intricate, and it should be maintained according to its spirit and design. That was not to require a special motion to correct immaterial differences between the allegations and proofs, which cannot possibly mislead the adverse party to his prejudice. In such cases they are to be wholly disregarded, or at once amended without unnecessarily delaying the proceedings, unless it is shown by affidavit that the opposite party has been misled, and in what respect that may have been the fact.

The order appealed from should be affirmed, but, under the circumstances, it should be without costs.

BRADY, J., concurred.

Order affirmed, without costs.

JOSEPH D. HIGGINS, APPELLANT, v. JOHN H. MURRAY,
RESPONDENT.

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Statute of frauds—contract for manufacture of material furnished by manufacturer—when title to manufactured article passes.

A contract for the manufacture of an article out of material to be supplied and furnished by the manufacturer, is not within the statute of frauds.

When an article is manufactured, and notice of that fact is given to a party who has ordered it, it becomes the property of the party ordering it, subject to the lien of the manufacturer for the price, and a right of action at once accrues for the price.

APPEAL from a judgment in favor of defendant, recovered on a trial at the Circuit.

On or about the 29th day of April, 1873, at the city of Brooklyn, the defendant gave to the plaintiff an order to manufacture for him a set of circus tents, materials to be furnished by the plaintiff, to be completed in three weeks' time. This order the plaintiff accepted, and he proceeded to manufacture said tents. Neither in the order nor in the acceptance of it, was any place of delivery of the tents specified, nor was any price, nor the time for the payment of the same mentioned. The plaintiff finished the tents on or about the 21st day of May, 1873, and notified the defendant of their completion. They were manufactured in every respect in compliance with the defendant's directions, and were of the value of \$1,395, the amount claimed in the complaint. The plaintiff held the tents subject to the defendant's order for more than two months, to wit, until on or about the 29th day of July, 1873, when he received a letter from the defendant, in which the defendant directed him to ship "my canvas" to Bath, Maine, "by freight, either by boat or by cars." By a second letter the destination of the canvas was changed to Lewiston, Maine. The cost of transportation the defendant agreed to pay.

Townsend & Weed, for the appellant. The place of delivery, in the absence of any agreement, is the premises of the manufacturer or seller, especially when the article to be delivered is bulky, as were

the tents. (*Terry v. Wheeler*, 25 N. Y., 520; *Pollen v. Leroy*, 30 id., 549, 554.) The time of payment, in the absence of any agreement, is immediately upon the execution and fulfillment of the contract. (*Lake O. R. R. v. Mason*, 16 N. Y., 451, 454.) Upon the completion of the tents the plaintiff had in every respect fulfilled his contract, and he was entitled to payment of their price or value. (*Crookshank v. Burrell*, 18 Johns., 58; *Muckey v. Hovenstine*, 3 N. Y. S. C., 28.) The plaintiff delivered the tents at the time and place specified, and notified the defendant of their completion. The delivery and notice vested the title in the defendant, certainly so far as to place the property at his risk. Nothing remained to be done by the plaintiff. (*Olyphant v. Baker*, 5 Denio, 382; *Hayden v. Demets*, 53 N. Y., 431; *Bement v. Smith*, 15 Wend., 493, 497; 2 Kent's Com., [side paging] 492.) The direction of the plaintiff to the forwarder to collect the price of the tents before parting with their possession, did not operate as a reclaimer of title. (2 Kent's Com., [side paging] 492; *Hayden v. Demets*, 53 N. Y., 426.)

S. P. Freeman, for the respondent, cited only *Baker v. Bourcicault* (1 Daly, 23).

DANIELS, J.:

This action was brought to recover the price of a circus tent. The evidence tended to show that the defendant ordered the plaintiff to make him a circus tent, which he agreed to do. It was afterward, pursuant to the order, manufactured by the plaintiff, and notice given of its completion by him to the defendant. After that, the defendant directed the plaintiff to ship the tent to him, at Lewiston, in Maine, by either boat or cars. The plaintiff shipped it by boat, under a bill of lading which required the price to be paid by the defendant and collected by the carrier on the delivery of the tent to him. It did not reach Lewiston, its place of destination, but was destroyed by fire on board the steamer at Portland. The learned justice presiding at the Circuit, on evidence tending to establish these facts, nonsuited the plaintiff.

The contract which the evidence tended to prove, was not within the statute of frauds, as it was for the manufacture of an article out

of material to be supplied and furnished by the plaintiff (*Crookshank v. Burrell*, 18 Johns., 58; *Sewall v. Fitch*, 8 Cow., 215, 218, 219; *Hight v. Ripley*, 19 Maine, 137; *Robertson v. Vaughn*, 5 Sandf., 1; *Towers v. Osborne*, Strange, 506; *Grover v. Buck*, 3 Maule & S., 178; *Donovan v. Willson*, 26 Barb., 138); and, according to its fair import, he was entitled to the price as soon as the tent was completed, and notice of that fact given to the defendant. No time was fixed for the delivery; and, by the construction which the law placed upon the agreement, the tent was to be delivered when it was finished, and notice of that fact was given by the plaintiff to the defendant. When that was done, it became the defendant's property, subject to the plaintiff's lien upon it for the price. And a right of action on those facts at once accrued for the recovery of the price. In *Crookshank v. Burrell* (18 Johns., 58), the plaintiff manufactured the wood work of a wagon for the defendant, which he was to go after and pay for in lambs at one dollar each. He did not go for the wagon, and on those facts a judgment for the price was sustained. The circumstance that the defendant there agreed to go after the wagon when the work was completed, does not distinguish the cases. For an obligation to receive and pay for the tent when it should be completed, and the defendant notified of the fact, will be implied by law from the nature of the transaction. In *Adlard v. Booth* (7 Carr. & Payne, 108), the plaintiff had printed books for the defendant, which were destroyed by fire while they remained in the possession of the printer. And the case was submitted to the jury on the simple question, whether the printer had completed the work before the fire occurred; and, as it was found that he had not, the defendant had the verdict. *Mixer v. Howarth* (21 Pick., 205), was, in its substantial features, very much like the present case. And there it was held that the plaintiff could recover the value of a carriage completed for the defendant, on notice of that fact, although no price was specified in the agreement under which the work was to be performed, and the carriage still remained in the manufacturer's hands. *Spencer v. Cone* (1 Met., 283), was decided under the same principle. In *Muckey v. Howenstine* (3 N. Y. S. C., 28), a recovery was sustained for barrels manufactured for the defendant, and not taken by him under the agreement made for the same.

The agreement for the manufacture of the tent not being within the statute of frauds, it was valid and binding on the parties, although no note or memorandum was made of it in writing, and consequently bound the defendant to receive and pay for the tent. When it was completed and he had notice of that fact, the plaintiff's right accrued for the recovery of the price, and from that time the property was at the risk of the defendant. That resulted from the fact that the contract was valid and had been fully performed by the plaintiff. What he afterward retained, was simply a lien for the price, which was not inconsistent with its recovery by action. And all that he did by shipping it subject to the payment of the price, was, to retain and preserve that lien as his security upon the property. By the fair import of the agreement, delivery and payment were to be simultaneous acts, and that was all which the bill of lading secured. The defendant could have his property by making that payment. And the plaintiff had the right to maintain his possession until such payment should be made, as long as no credit was to be given by the agreement.

At common law a mere agreement to sell specified articles of personal property at once, and without delivery of actual possession, vested the title in the vendee, and the right to the price in the vendor; but the former could not take the goods without either payment or tender of the price. This principle is quite analogous to the one which governs the rights and liabilities of the parties under a contract for the manufacture of a specified article. As soon as the article has been completed and notice given to the other party of that fact, the latter becomes obligated to take it and pay the price for it. If he does not do so, a right of action accrues to the manufacturer for the recovery of the amount due to him. And that right cannot be lost by sending it according to the direction of the person for whom it has been made, merely by subjecting it to the payment which the manufacturer may insist shall be made before the property passes beyond his control.

The shipment in the manner it was made, was no more than a continuance of the previous relations existing between the parties. The plaintiff held the possession of the property as the bailee of the defendant, to be delivered over to him whenever the price was paid. And in securing the preservation of that right, while he

complied with the defendant's direction to send it to him, he did nothing more than he was entitled to insist upon. The property had been subject to the defendant's risk from the time he had notice of its completion, and that was not transferred to the plaintiff by shipping it, as he did, conformably to the defendant's directions and his own lien for the price of it.

The case of *Baker v. Bourcicault* (1 Daly, 23), is relied upon by the defendant in support of the ruling at the Circuit. But as defendant there had no notice of the completion of the cards, and only agreed to pay for them when they were received, it is distinguishable in principle from the present controversy. The agreement with the defendant, in judgment of law, bound him to take the tent and pay for it when he had notice of its completion. That he failed to do, and violated his contract. For that the plaintiff was entitled to recover, if the jury believed his evidence, even though the property was afterward destroyed, as long as it was exposed to the risk encountered by it, without his fault and in direct obedience to the orders of the defendant. The judgment should be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed and new trial ordered, costs to abide event.

ALEXANDER H. COULTER, APPELLANT, v. THE BOARD
OF EDUCATION FOR THE CITY AND COUNTY OF
NEW YORK, RESPONDENT.

Contract—receipt in full—Liability of master to servant for negligence of a co-servant.

The plaintiff entered into a contract with the school officers of the Eighth ward of the city of New York to do all the carpenter work necessary in erecting a school-house. In consequence of the laches of the contractor for the mason work, the plaintiff was delayed in fulfilling his contract, and brought this action to recover the damages sustained thereby.

In compliance with one of the requirements of the contract, the plaintiff, at the time of receiving the final payment, filed a certificate stating "that all claims and demands for extra work or otherwise, under or in connection with the

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contract * * * have been presented to the said school officers, and the amount to be paid therefor agreed upon by and between them or a majority of them and the undersigned, to wit, the sum of \$433.83; and I further certify that the last payment under said contract * * * will be in full of every claim or demand, except the amount so agreed upon for extra work." *Held*, that the certificate operated as an extinguishment of any claim the plaintiff might have. Whether, if this were not so, the plaintiff and the mason being fellow-servants, he would not be precluded from recovering, under the rule that one servant cannot maintain an action against the common employer on account of injuries sustained by the negligence of a co-servant, *quære*.

APPEAL from a judgment in favor of the defendant, entered on the report of a referee.

E. Ellery Anderson, for the appellant. The effect of the words contained in the certificate cannot be greater than a release of a particular demand, followed by a general release of all claims and demands, which has always been held to discharge the particular matter mentioned only. (*McIntyre v. Williamson*, 1 Edw. Ch., 54; *Jackson v. Stackhouse*, 1 Cowen, 122; Chitty on Contracts, 90, 858.) The certificate refers to claims under and in connection with the contract. It is submitted that this only embraces amounts which the plaintiff could sue for under the contract, and has no reference to a claim for damages against the defendants by reason of the negligence of their agent, the mason. (*Allamon v. The Mayor*, 43 Barb., 33; *Dubois v. Delaware and Hudson Canal Co.*, 4 Wend., 285.) The rule, that when an injury is inflicted by one employe on another employe, both being under the same employer, and engaged in a common business or enterprise, the employer does not guarantee to each employe the competency of the other employes, only applies to cases where the superior or employer has not, himself, by failure of duty, or by omission or neglect on his part, produced or contributed to the injury complained of. (*Flike v. Boston and A. R. R. Co.*, 53 N. Y., 549; *Laning v. N. Y. C. R. R. Co.*, 49 id., 521; *Brinkner v. Same*, id., 672; *Warner v. Erie Railway Co.*, 49 Barb., 558, reversed in 39 N. Y., 468; *Keegan v. Western R. R. Co.*, 8 id., 175.)

E. Delafield Smith, for the respondent. If the work on the part of the mason was unreasonably delayed, it was the duty of

the school officers, and not of the defendants, to see that he complied with the terms of his contract. The case, then, amounts to this, that the school officers, by neglecting to enforce the provisions in Armstrong's contract against delay, caused injuries and damage to the plaintiff. This, conceding all the plaintiff claims to be true, was misfeasance on the part of the school officers, who were independent officers, and for such misfeasance, or for malfeasance of such officers, the defendants cannot be held liable. (*Martin v. Mayor of Brooklyn*, 1 Hill, 545; *Lorrillard v. Town of Monroe*, 1 Kern., 392; *Russell v. The Mayor of New York*, 2 Denio, 461; *Hafford v. City of Bedford*, 16 Gray, 297.) The plaintiff is estopped by the certificate of May 10, 1864, from asserting any claim on the defendants for the alleged grievances stated in the complaint. (*Devlin v. Mayor*, 4 Duer, 337.) If the injuries of which the plaintiff complains arose from the negligence or delay of the contractor for the mason work, Armstrong, it is clear that the defendants cannot be held liable therefor. Armstrong was an independent contractor with the school officers of the Eighth ward, and for his carelessness, negligence, or unskillfulness in the execution of his work, neither the defendants nor the school officers are liable. (*Kelly v. The Mayor*, 1 Kern., 432; *Blake v. Ferris*, 1 Seld., 48; *Pack v. The Mayor*, 4 id., 222; *Treadwell v. The Mayor*, 1 Daly, 123.) Even admitting that the school officers of the Eighth ward can be regarded as the agents of the defendants, then the plaintiff and Armstrong were two servants or employees in the employ of one principal, and in the same general business, and for any damages sustained by the plaintiff, by reason of the negligence, carelessness or unskillfulness of Armstrong, the defendants are not liable. (*Coon v. The S. and U. R. R. Co.*, 5 N. Y., 492.)

BRADY, J.:

The plaintiff made a contract with the school officers of the Eighth ward of this city, to do the carpenter work necessary toward the erection of a school-house in that ward. The mason work was to be done by Mr. Lanty Armstrong, with whom the officers made a contract for that purpose, and about the same time the agreement was made with the plaintiff. The mason failed to perform with sufficient expedition to allow the plaintiff to proceed with his work,

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as he was ready and able to, and in consequence thereof he was subjected to loss by a rise in the cost of labor and in the price of the materials to be employed. The work of the plaintiff was to be done under the direction and supervision of the superintendent of school buildings, and the materials were also to be furnished under his supervision. The plaintiff complained of the delay of the mason, and duly notified the superintendent of it, but no action was taken, it would seem, to compel the mason to proceed, or to abandon his contract. The necessary facts to establish the claim, assuming it to be one which could be enforced, were sufficiently proved. The averments in the complaint to that end were established. The complaint was, nevertheless, on the motion of the defendant's counsel, dismissed. The question presented is, whether that disposition of the case was proper.

There are several reasons why the plaintiff cannot maintain this action, some of which will be considered.

First. It appeared by the contract that the last payment was not to be made until a certificate of the superintendent of school buildings, that the payment was due, had been filed in the office of the clerk of the board of education, and, in addition thereto, that there had also been filed in that office a certificate that all claims and demands for extra work or *otherwise, under or in connection with the contract*, had been presented to the parties of the first part, and the amount to be paid therefor agreed upon by and between them, or a majority of them, and the plaintiff, and that such payment was in full of *every claim or demand whatever, in the premises, except* the amount so agreed upon for extra work. It also appeared that a certificate had been given and filed in accordance with these provisions, and that the plaintiff had also signed a certificate contemplated by them. The certificate of the officers concludes as follows: "We do further certify that the sum of \$433.92 has been agreed upon and allowed by us in full of all claims and demands for extra work or otherwise, under or in connection with the said contract." The plaintiff's certificate is as follows:

"I do hereby certify that all claims and demands for extra work or otherwise, under or in connection with the contract of Alex. H. Coulter, made with the school officers of the Eighth ward,

for the carpenter work on the new school building of ward school No. 8, situate on Grand, near Laurens street, in said ward, dated the 4th day of February, 1863, have been presented to the said school officers, and the amount to be paid therefor agreed upon by and between them, or a majority of them, and the undersigned, to wit, the sum of \$433.92. I further certify that the last payment under said contract, to wit, the sum of \$1,767, will be in full of every claim or demand whatever in the premises, except the amount so agreed upon for extra work.

“Dated New York, *May* 10, 1864.

“ALEX. H. COULTER.”

The provisions of the contract relative to the certificate to be given for the last payment are clear. They contemplate a final adjustment of all matters between the contracting parties, in any way connected with or growing out of the contract. This is not only indicated by the language employed, but by the further agreement contained in the eleventh paragraph of the contract, which is as follows :

Eleventh. “Should any dispute arise concerning the true construction of the plans or drawings and specifications hereinbefore mentioned, or any part of either, the same shall be decided by the said superintendent of school buildings, and his decision shall be final ; but should *any other difference* arise between the parties of the first and second parts, the same may be submitted to the arbitration of two competent and disinterested persons, one to be named by the parties of the first part, or a majority of them, and the other by the party of the second part, which two, in case they cannot agree, may choose an umpire ; and the decision of the arbitrators, or of the umpire, shall be binding and conclusive on all the parties hereto.”

The defendants are not the contracting parties, although the product of the agreement inures to their benefit. They are the paymasters, and are to be governed in their payments by the action of officers over whom they have by law no control, except so far as the right to approve of the contract made confers it. They rely upon the acts of these officers when a contract is made in reference to the completion of the work in accordance with the

obligations assumed, and have the right to believe that the duties imposed have been properly discharged. When the certificate for which the contract calls is presented, it is their right therefore to assume that it has been given at the proper time and in the proper manner; that is, after an arrangement or adjustment of all matters of difference, if any have existed, and more particularly when the contractor himself, by his own deliberate act, has so declared. The certificates of the school officers and the plaintiff contain precisely this: The officers certify that a further sum beyond the last payment has been agreed upon and allowed by them in full of all claims and demands for extra work or *otherwise, under or in connection with the said contract*. The plaintiff certifies that the last payment under the contract would be in full of every claim or demand whatever in the premises, except the amount agreed upon for extra work; and further, that all claims and demands for extra work or otherwise, under or in connection with the contract, had been presented to the school officers, and that the amount to be paid therefor was the sum of \$433.92. There is no evidence that the present claim was not made and passed upon. There is no evidence that prior to the payments made to the plaintiff, the present claim was presented to the defendants, or that they had notice of it; and they parted from a fund which they might have held as an indemnity against a litigation which might have followed a refusal of the school officers to give the certificates, which must have been withheld unless the damages claimed by the plaintiff had been allowed. It is no answer to this, that Mr. Davenport, the finance clerk, told the plaintiff when he signed the receipt, that the certificate only related to the extra work. He had no authority to represent or to bind the defendants in any way, and what he said cannot effect their rights. The plaintiff had signed the certificate which contained the important elements for the defendants, and there is no pretense that any undue advantage was practiced or attempted in reference to it. The certificate and receipt operated as an extinguishment of his claim. (*Devlin v. The Mayor*, 4 Duer, 337.) He obtained his money, giving that paper, and must take the consequences.

Secondly. The plaintiff and the mason were employed by the same principal in a common enterprise, and no action can be sus-

tained by either against the employer on account of injuries sustained by the negligence of the other. (*Coon v. The S. and U. R. R. Co.*, 5 N. Y., 492; *Warner v. Erie R. Co.*, 39 id., 468; *Brickner v. N. Y. C. R. R. Co.*, 49 id., 672; *Laning v. Same*, id., 521; *Flike v. Boston and A. R. R. Co.*, 53 id., 549; *Wright v. N. Y. C. R. R. Co.*, 25 id., 562.) This question, having been argued elaborately on both sides, is discussed, but in great doubt whether the doctrine invoked by the defendants can be called into requisition; whether, in other words, the mason, being a separate contractor, may be regarded as a servant within the principle. The plaintiff's counsel sought to avoid the application of this rule of law, upon the theory that the act which occasioned the plaintiff's damages was that of the principal—the employer—but the fact is otherwise. The delay was caused by the mason, he and the plaintiff working together in the construction of the school-house. The theory suggested rests, it would seem, on the proposition that the defendants could, by the exercise of their rights under the contract, require the mason to proceed more rapidly; but this must be assumed to be so, and without having all the facts and circumstances before us. This cannot be done by the appellate court, and could not be done by the tribunal before which the cause was tried. Neither there nor here, can any speculation be entertained, as to the result of a controversy which might have taken place between the defendants and one not a party to the record. If it were so, however, the cause would be too remote to warrant the imposition of damages. If there be any merit in the distinction sought to be enforced, it can only be where the employer is directly chargeable by his own act with causing the injury, and not, as in this case, where the attempt is made to reach him because he omitted, when he might have done so, to prevent another from doing it. The cases, *supra*, do not in any respect conflict with this conclusion. The rule which absolves the employer from responsibility for damages caused by the negligence of a fellow laborer or employe, is not free from exceptions; but they arise only when the employer has failed to select competent and skillful workmen, or materials fit for the emergency which calls for their use. The history of the doctrine itself, is given by Chief Justice CHURCH in *Flike v. Boston and Albany R. R. Co.* (*supra*). The rule of exception is

stated in that case as follows: "The master is liable if his own negligence or want of care produces the injury, and this may be manifested by employing unfit servants or agents, or furnishing improper or unsafe machinery, implements, facilities or materials for the use of the servant." There is in this case no evidence of the incompetency of the mason employed — a fact which, on these authorities, it is the duty of the claimant to show, if he seeks redress from the employer for the act of the fellow-servant. (25 N. Y., *supra*.) The gravamen of the plaintiff's case here is delay. The ability of the mason to accomplish his task, we do not understand to be questioned. His negligence, or rather his omission to do his work with sufficient dispatch to shield the plaintiff, is the foundation of the demand asserted. The claim of the plaintiff is one that could not well be foreseen. It was the sudden increase of wages and materials, events which are not always foreshadowed, and against which human foresight cannot always guard. The flexibility of the common law cannot mould itself so as to create a special rule for each particular case, without becoming an unsettled, fluctuating and unsteady science. There must be, and indeed there is, a general rule to meet the varied vicissitudes of life, in business and otherwise, marked however by exceptions which are the necessary results of peculiar facts and circumstances developed and requiring the qualification made. When these elements are established, there are few occasions when they are not found broad enough to embrace almost every form of redress allied to the subject to which they relate. Such is the case here. The negligence complained of is not that of the defendants, assuming the superintendent of school buildings to be the defendants' agent. It was not his duty to perform the mason work. He had no authority to hurry its performance. It may be assumed that he was to supervise it; but that was only to see that the mason performed his contract properly, and thus to protect the defendants from unjust dealings. Whether he or the defendants could expedite it by compulsory process, does not appear, as already suggested. There may have existed many and good reasons against the accomplishment of such a result. It is clear, however, that this is not a case within the exceptions to the rule stated, if the rule as suggested apply; and unless a new one is to be announced for this case, the defend-

ants are not liable. There are other questions which might be discussed here, but they are not necessary for the disposition of this appeal, and are not therefore considered.

The judgment should be affirmed, with costs.

DAVIS, P. J., concurred; DANIELS, J., concurred in the result.

Judgment affirmed.

WILLIAM H. PLACE, RESPONDENT, v. CHARLES A.
CHESEBROUGH, APPELLANT.

Reference — inability of party to pay referee's fees not valid objection to — when ordered — power of court to order.

It is no objection to an order referring an action, that the plaintiff is insolvent and will be unable to pay the referee's fees, and that the action is brought in bad faith.

A reference may be ordered although one of the several issues in the case may not require the examination of a long account.

The power of the court to refer common-law actions involving the examination of a long account, existed at the time of the adoption of the Constitutions of 1777 and 1822.

APPEAL from an order directing a reference in an action on contract.

Frank E. Blackwell, for the appellant.

E. Schenck, for the respondent.

BRADY, J. :

The bills of particulars to the proof of which the plaintiff's evidence must be directed, consist of about sixty items, and it abundantly appears, therefore, that the trial of two of the issues of fact, at least, in this controversy, will require the examination of a long account. Indeed, this necessity is not questioned by the appellant. His objections to the reference, indicated by the affidavit read in opposition to the motion therefor, are, that the plaintiff is insolvent and cannot pay the referee's fees, and that the action is brought in bad faith. Neither of these objections can be entertained. The

insolvency of a plaintiff does not avoid the necessity of applying to his case the usual rules of law. Whether it would subject him to the obligation of filing security of any kind, is an entirely different question. The good faith of an action is not the subject of investigation on a motion of the kind made herein, and the result of which we are called upon to review. That element goes to the merits. When it appears that the trial of an issue of fact will require the examination of a long account on *either side*, it may be referred. (Code, § 271, sub. 1.) The practice of referring such cases has long prevailed (*Marter v. Hotchkiss*, 1 Keyes, 585), and is entirely consistent with administration of justice; indeed, indispensable to it, in many litigations which have been presented to the courts for settlement. (See *Whitaker v. Desfosse*, 7 Bosw., 678; *Goodyear v. Brooks*, 2 Abb. Pr. [N. S.], 296; *Batchelor v. The Albany City Ins. Co.*, 6 id., 240.)

The proposition, that when there is one of several issues in an action on contract, which does not require the examination of a long account, a reference cannot be ordered, is erroneous and at variance with the established practice of the court. It is not supported by the cases of *Evans v. Kalbfleisch* (16 Abb. [N. S.], 13) or *Townsend v. Hendricks* (40 How., 143).

In the latter case the action was in tort, and the results declared were, that in such an action a compulsory order of reference could not be made; that section 271 of the Code, must be read in connection with section 2 of article 1 of the Constitution, and was limited to actions on contract; and that where the action from its nature was not referable, the answer could not make it so.

In the former case the court held that there was but one cause of action alleged in the complaint which arose upon a special contract, and that the action would not require the examination of a long account. It is quite evident that these cases do not sustain the rule stated, and equally clear that they are not applicable to this case. The power of the court to refer common-law actions on contract, involving the examination of a long account, existed at the time of the adoption of the Constitutions of 1777 and 1822, and it has been settled by repeated decisions of the courts of this State, that, under statutes relating to the subject, passed prior and subsequent to the

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Constitution of 1777, compulsory references could be ordered in actions on contracts. (*Townsend v. Hendricks, supra.*)

The order made at Special Term should for these reasons be affirmed, with ten dollars costs and disbursements.

DAVIS, P. J., and DANIELS, J., concurred.

Ordered accordingly.

ELIZABETH WALKER AND OTHERS, EXECUTORS, ETC., APPELLANTS, v. CHARLES B. SHOEMAKER, RESPONDENT.

Action for rent—when counter-claim may be interposed.

In an action brought to recover rent, a mere trespass, or a tort of any character not amounting to eviction in whole or in part, cannot be set up as a defense. Where a landlord, being desirous of repairing the roof of his building, agreed with the tenant that if he would allow him to enter upon the premises and repair the same, he would do the work with diligence, care and caution, which he failed to do, whereby the tenant was injured: *held*, that the tenant might set up the damages sustained thereby as a counter-claim in an action brought by the landlord to recover rent.

Cram v. Dresser (2 Sandf., 120) distinguished.

APPEAL from an order made at the Special Term, overruling a demurrer to the counter-claim set up in the defendant's answer.

Emile Beneville, for the appellants. The cause of action set forth in the counter-claim, does not grow out of any contract; and, although pleaded in form *ex contractu*, is a pure tort, and cannot be counter-claimed in an action for rent. The defendant's remedy is an action for damages resulting from the plaintiffs' negligent and abusive use of the license granted them. (*Cushing v. Adams*, 18 Pick., 110-114; *Drake v. Cockroft*, 4 E. D. Smith, 34; *Mayor, etc., v. Parker Vein S. S. Co.*, 21 How., 289; *Wendell v. Johnson*, 8 N. H., 220; *Reynolds v. Clark*, 1 Str., 624; *Cram v. Dresser*, 2 Sandf., 120.) Nor can the defendant, by changing the form of his action, change the nature of the plaintiffs' liability, and convert that into a contract, which the law deems a tort. (*Walter v. Bennett*, 16 N. Y., 252; *Mayor, etc., v. Parker Vein S. S. Co.*,

21 How., 289.) And in no case is the tenant's claim for damages resulting from the landlord's negligence or trespass, and not amounting to an eviction, an answer to an action for rent. (*Dyett v. Pendleton*, 8 Cow., 729; *Edgerton v. Page*, 20 N. Y., 281.) The injuries, in the case at bar, are alleged to be inflicted on the defendant's personal property, and are not to the possession or quiet enjoyment of the demised premises. (*Drake v. Cockcroft*, 4 E. D. Smith, 34.) The matter pleaded in defendant's counter-claim is not a contract, since it lacks one of the principal elements of a contract, viz., *consideration*. (1 Pothier on Oblig., 123; 1 Parsons on Cont., 427; Blackstone Com., bk. II, p. 444.) The permission to enter the demised premises was a mere technical license, and an abuse of it would give the tenant a right of action for damages. (3 Kent's Com., 452; *Wolf v. Frost*, 4 Sandf. Ch., 73; *Cook v. Stearns*, 11 Mass., 533.)

Jos. K. Murray, for the respondent.

BRADY, J. :

The action is to recover rent. The defense is a counter-claim. The facts constituting it are as follows: After the defendant had taken possession, plaintiffs obtained the right, by agreement with him, to put a new roof on the house demised, which was not needed to prevent waste or injury — a privilege not reserved by the agreement of rental. In consideration of this right, thus granted, the plaintiffs promised to do the work with diligence, care and caution, which they failed to do, and by which failure the defendant was injured. The court at Special Term held that these elements presented a good defense by way of counter-claim, and overruled the plaintiffs' demurrer, by which the converse of the proposition was sought to be maintained. The defense by way of counter-claim, in actions of this kind, has been limited by the cases, and the rule declared is, that a mere trespass, and indeed a tort of any character, not amounting to eviction in whole or in part, cannot be set up as a defense. (*Cushing v. Adams*, 18 Pick., 110, 114; *Drake v. Cockcroft*, 4 E. D. Smith, 34; *Mayor, etc., v. Parker Vein S. S. Co.*, 21 How., 289; *Cram v. Dresser*, 2 Sandf., 120; *Edgerton v. Page*, 20 N. Y., 281.)

It must appear, to create such a defense, that the acts of the

landlord amount to a breach of the contract of letting; otherwise they are not connected with the subject of the action. (*Edgerton v. Page, supra.*) None of these adjudications, however, discuss the effect of the provisions of the Code in relation to counter-claims, to which particular reference will be made hereafter, and none of them bear any analogy to this case, except *Cram v. Dresser (supra)*. In that case the landlord entered to make repairs under a right thereto reserved in the lease, and the defendant, feeling aggrieved by the manner in which the right was exercised, claimed damages in diminution of the rent, but the claim was rejected. The decision was made, however, before the provisions of the Code in reference to counter-claims were enacted, and rested upon the doctrine of recoupment of damages established by the case of *Reab v. McAlister* (8 Wend., 109); a doctrine conceded to be more limited than the statutory counter-claim under which the defendant here seeks to be allowed his damages. Under the provisions of the Code (§§ 149, 150), there are two classes of counter-claims, indicated by the first and second subdivisions of section 150. The second subdivision, prescribing the second class of counter-claims allowed to be set up, so far as it relates to the subject-matter in hand, is as follows: "In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." The cause of action which the defendant sets up as a counter-claim is one arising on contract. It is not a trespass or a tort, but solely a claim for the violation of an express contract. The plaintiffs, to put on the new roof, entered under the contract and as matter of right, having promised to do what they were granted the privilege of doing, in a careful workmanlike manner, and diligently, so that the beneficial enjoyment of the premises would not be prevented or unnecessarily interfered with. They failed to do this, and the defendant's claim for such failure necessarily arises out of contract, and is one *relating* to the subject-matter of the action, namely, the use of the premises demised; though perhaps not *connected* with the subject of the action, namely, the payment of the rent as declared by the cases, *supra*. The Code thus providing that when, as in this case, the action arises on contract, "any other cause of action arising on contract" may be set up as a counter-claim, the defense interposed herein,

arising, as it does, on contract, is a valid defense and cannot be rejected. The design of the statute is to avoid circuitry of action, allowing parties to settle their differences by the examination of mutual demands, and arraying them each against the other. This object seems to be very clearly expressed by the language employed: "Any *other* cause of action arising *also* on contract;" and by the further provision: "The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both;" thus establishing a consolidation of causes of action through the medium of an answer, and giving the parties an opportunity, in one litigation, of disposing of various claims, if they really exist, or are asserted to have some foundation in fact. For these reasons it is thought that the defense was proper, and the decision of the court at Special Term correct. The suggestion that the agreement is without consideration, is not, under the circumstances of this case, entitled to serious examination. The plaintiffs have enjoyed the advantages of the contract. It is executed, and they must accept the burdens it imposed, whatever they may be. The proposition that the agreement was a naked or conditional license, and revokable at pleasure, is not available to the plaintiffs as a release from any obligation incurred by its use. The defendant could not have withdrawn it, as suggested by the learned presiding justice in deciding the demurrer, after the plaintiff had partially completed the roof. This seems to be demonstrated by the cases which he cites: *Mumford v. Whitney* (15 Wend., 380); *Pierrepoint v. Barnard* (2 Seld., 279); see, also, *Miller v. The Auburn and Syracuse R. R. Co.* (6 Hill, 61). But being executed and unrevoked, it is clear on the authorities, that even if the agreement were a mere license and without consideration, it would be a justification of the act of entering upon the premises to erect the roof, and therefore binding. The consideration of the agreement here was the benefit derived from the completion of the new roof, while the premises were occupied by a tenant paying rent. The order made at Special Term should be affirmed, with costs.

DANIELS, J., concurred.

Order affirmed.

DANIEL FALLON, PLAINTIFF, v. THE MAYOR, ALDERMEN,
ETC., OF THE CITY OF NEW YORK, DEFENDANT.

Chap. 758, Laws of 1873—effect of, on leases of armories in New York—Fraud—when can be shown.

The only effect of section 2 of chapter 758, Laws of 1873, was to remove the prohibition against paying the arrears of rent upon leases of armories in the city of New York, created by section 2 of chapter 9, Laws of 1872, in the cases specified in the said section.

Such section did not take away legal defenses that existed by reason of the invalidity of such leases because made in violation of law, nor did it deprive the city or county of the right to allege fraud and collusion between the lessor and the public officials as a defense to actions upon such leases.

The board of supervisors had no authority to make leases for armories and charge the county with the obligations thereby created, until all the requirements of the act of 1870 (chap. 80), had been complied with.

MOTION for new trial on exceptions ordered to be heard in the first instance at General Term.

Fred. Smyth, for the plaintiff.

J. C. Carter, for the defendant.

DAVIS, P. J. :

The court below directed a verdict for the plaintiff, and ordered the exceptions on the part of the defendants to be heard in this court in the first instance, suspending judgment in the mean time. The principal exceptions arise upon the request to submit to the jury the question whether the lease on which the action was brought, was procured by fraudulent collusion between members of the board of supervisors and the plaintiff, and upon the several requests to charge on propositions of law. It is obvious that the learned judge by whom the Circuit was held, took this course for the purpose of procuring as speedily as practicable the opinion of the appellate courts upon the legal propositions involved, and especially upon the effect of section 2, of chapter 758, of the Laws of 1873 (Sess. Laws of 1873, p. 1127), upon the rights and obligations of the respective parties to such leases. That section is in

these words : " Nothing contained in any act heretofore passed shall prevent the payment of arrears of rent for armories and drill rooms, in cases in which the board of supervisors, since the first day of January, 1872, shall have authorized the leases of such armories and drill rooms to be canceled and the public use thereof to cease, on condition of the payment of such arrears of rent, or in cases in which the premises shall have been continuously occupied as armories or drill rooms until the present time, or until the expiration of the terms for which the same were leased." It is obvious that the lease on which the plaintiff sues, is within the scope of this provision, because the premises had been continuously occupied to the then present time. The object of this statute is very plain. It is to remove the supposed preventive effect of some previous act or acts of the legislature ; and its end is fully accomplished when that removal is produced. By a provision contained in section 2 of chapter 9 of the Laws of 1872, the payment of arrears of rent on all leases and armories, was excluded from the general provisions of the chapter, and in substance prohibited. The second section of chapter 758 of the Laws of 1873, was intended to and does remove this prohibition upon the payment of " arrears of rent," in the cases specified in the section, to wit, where the leases had been canceled by authority of the board of supervisors, and the public use of the demised premises had ceased on condition of payment of such arrears ; and in cases in which the premises had been continuously used up to the time of the passage of the law ; and in cases where the term of the lease had already expired, and such use had been continued up to the expiration of the term. It took away an obstacle which prevented the payment of such *arrears* ; and it applies only to arrears upon leases which had terminated by agreement or by lapse of time, and to *arrears* upon continuing leases when occupation and use had gone on up to the passage of the act. The language used is not apt to take away legal defenses that existed by reason of the invalidity of leases because made in violation of law ; nor to deprive the city or county of the right to allege fraud and collusion between the lessor and the public officials, as a defense to actions upon such leases. If the intent had been to give validity to all outstanding leases of armories and drill rooms, and take away all defenses thereto, whether of want

of authority or fraud, language would have been chosen which would have plainly expressed that intent, as might well have been done in fewer words than those of the section under consideration; but pains were taken, by the use of words of well known significancy, to limit the effect of the section to "*arrears of rent*," and to the removal of an obstacle specially interposed by previous act of the legislature, which *prevented payment of arrears*, in the specified cases. As the rent sued for in this action has all accrued subsequently to the passage of the act of 1873, it is not "*arrears of rent*" within the descriptive words of that act, and the case stands unaffected by the act. The defendants are sued for an alleged liability of the county of New York, and if an action will lie for such liability, it must be held that the defendants may set up and assert any defense which infected the contract, or affected the right to recover thereon. We think the case should have been sent to the jury upon the question of fraud. In considering this question, it is hardly necessary to say, that, inasmuch as the jury would have had the right to give full faith and credit to all the evidence and testimony on the part of defendants, tending to show fraud, and to have drawn every legitimate inference therefrom leading their minds in that direction, and to have discarded altogether the evidence in denial or explanation of the alleged fraud, we are, since the question has been withheld from the jury, to look at the case as though it stood, so far as this question of fact is concerned, upon the defendant's evidence only. That evidence tended to show that portion of a committee of the board of supervisors, charged with the duty of finding suitable premises for a drill room or armory, were informed that the premises described in this lease were in the hands of a party ready to lease them to the county for at most \$10,000 per annum. That one member of the committee had a brother-in-law, the plaintiff, who was employed in the office of the mayor as server of corporation notices. That soon after information was given two members of the committee that the premises could be had for \$10,000, this brother-in-law of one of those to whom such information had been given, took a lease to himself of the premises for ten years, at an annual rent of \$9,500, from January 1, 1873. That two days afterward the committee reported in favor of renting the same premises from the brother-in-law of one of the committee,

for the same term of ten years, at an annual rent of \$14,000 and all taxes; and a resolution was passed on the same day to rent on those terms; and on the same day the lease was executed between the plaintiff, who was and is the brother-in-law of one of the committee, and the board of supervisors. A jury would certainly have been justified in scanning this transaction with a jealous eye, and perhaps in concluding that it was a snug and shrewd little job to secure to the plaintiff a comfortable income of \$4,500 per annum for ten years, at the expense of the tax-payers of the city; and it is quite possible they might have believed and found that it was brought about by collusion between the plaintiff and some of the officials connected with the affair, and so have stamped the transaction as a fraudulent one. The collusion of the plaintiff with any one or more of such officials would have been a fraud upon the county, and the fact that such collusion and the circumstances attending the procuring of the lease were unknown to the board of supervisors as a board, would not diminish the fraud on plaintiff's part, but would rather intensify it by necessarily involving the concealment of the collusive action of a part of the committee with himself. We think the motion for a new trial should be granted on this point.

The powers of the board of supervisors to make leases of this kind, and charge the county with the obligations thereby created, were specifically defined by acts of the legislature. They could only act in that regard in the execution of a duty which the statute imposed, and that duty could arise or exist only on it appearing that the preliminary requirements of the act of 1870 had been complied with. (Laws of 1870, chap. 80, vol. 1, pp. 217-248.)

The lease was made in 1872, for a term to commence on the 1st of January, 1873. It was an original lease, and not the renewal of one made under previous laws, and the resolution of the 19th of December, 1872, passed three days after the making of the lease, and before the commencement of the term, transferring the sixth regiment of the New York State national guard to the leased premises, furnished a strong presumption that the lease was made for the use of that regiment. The effort to uphold the authority upon papers prepared on the application of the ninety-sixth regiment in 1864, was not satisfactory. That regiment never occupied

the premises, nor was it connected with them otherwise than by an application on the 16th of December, 1872, by the commanding officer of that regiment, which the subsequent action of the board shows, was not acceded to. Enough, we think, was not shown by the plaintiff, to authorize the action of the board in making the lease; but as there must be a new trial on the question of fraud, it is not so material to analyze and examine this question at length, as upon the new trial it may be presented upon other and different evidence. The occupation of the premises by the sixth regiment, as shown, was not such a ratification of the lease as makes it obligatory on the county or city. There would be no protection for the corporation of New York, if the doctrine of ratification which is applied to private persons and corporations, was held to be applicable. We have often held to the contrary, and cannot therefore give validity to a lease void for want of authority to make it, or for fraud in making it, because of the occupancy and use of the premises by some regiment assigned to them. It is another question whether any, and what liability can grow out of such occupancy.

The motion for a new trial should be granted, with costs to abide the event.

DANIELS, J., concurred.

Motion granted, costs to abide event.

ROBERT T. FORD, PLAINTIFF, v. THE MAYOR, ETC., OF
THE CITY OF NEW YORK, DEFENDANT.

Chap. 80, Laws of 1870—power of supervisors to lease armories—ratification of lease.

The board of supervisors cannot lease buildings for armories simply because, in their opinion, they will sooner or later be needed for the use of some one or more of the regiments of the county. No power to make such leases exists, except upon compliance with all the requirements of section 120 of the military code.

Occupancy of premises so leased, by one of the regiments of the national guard, and payment of rent from time to time by the officers of the city, cannot be treated as a ratification of a lease made without authority.

MOTION for judgment on a verdict ordered by the court, subject to the opinion of the court at General Term.

W. H. Townley, for the plaintiff.

James C. Carter, for the defendant.

DAVIS, P. J. :

In the case of Fallon against these defendants (argued at the present term), we have considered the effect of section 2 of chapter 758 of the Laws of 1873, and have come to the conclusion that nothing contained in that section prevents the defendants from contesting the validity of a lease in an action brought for rent accruing subsequently to the passage of that act. * No question of fraud is made in this case. It stands upon undisputed facts, and the only question it presents, is, whether the board of supervisors had power to make leases of buildings for armories and drill rooms, *generally*, and in anticipation of the wants of the regiments or military companies of the county, and without regard to the requirements of section 120 of the military code. (Laws of 1870, chap. 80, vol. 1, pp. 217, 248.) The lease on which this action is brought, was made on or about the 19th day of September, 1872, for the term of ten years and seven months from the 1st day of October, 1872, at an annual rent of \$24,000.

Its only basis, as a professed compliance with the requirement of the act under which the authority to make such leases is derived, is to be found in a resolution passed by the board of supervisors on the 19th day of September, 1872. That resolution is an instruction to the clerk of the board to execute a lease of the premises "to be for the purpose of armories and drill rooms;" and it is based upon the report of a committee, that the building is suitable for the purposes, and can be leased, if obtained immediately, on very advantageous terms to the county.

The report states, also, that "the sixth regiment must have an armory forthwith, as the lease of the building known as Tammany Hall has been canceled, and the said regiment will be compelled

* *Vide* opinion in Fallon v. The Mayor, *ante*, p. 583.

to vacate. Other portions of the militia have pressing needs of new or additional accommodation."

The lease was not, however, made for the sixth regiment, nor for any regiment in particular, but upon the opinion of the committee and the board that it would be wanted for some regiment. It was attempted to uphold the lease, by showing that the twelfth regiment had, in October, 1862, made application by the captains of its respective companies, in compliance with the statute then existing, for an armory and drill room, and that that regiment subsequently occupied a portion of the premises.

It appeared, however, that at the time of making the lease, in September, 1872, the twelfth regiment was in occupancy of other premises, leased by the county for its use for a term of five years from the 1st day of May, 1870, and that on the 19th day of December, 1872, a resolution was adopted by the board of supervisors, accepting a proposition of the lessor of those premises to cancel the lease on payment of rent up to May, 1873; and thereupon the lease was soon after canceled, and the said twelfth regiment was transferred to the premises leased of plaintiff.

There seems to be nothing in these facts to support the power to make the lease in question, unless it be found in the fact that some months after this lease was executed, it became convenient to put it into the occupancy of the twelfth regiment, which, having lost its former armory by a cancellation of the lease, was entitled to have another armory provided by the county. The creation of that exigency by the cancellation of an existing lease, did not, by retro-active sanction, give validity to the lease made some two months before. The case upon this point comes right down to the naked question: Had the supervisors power to lease the premises of plaintiff without any compliance with the requirements of section 120 of the military code, because the board was of opinion that they would sooner or later be needed for the use of some one or more of the regiments of the county? In our opinion, this question must be answered in the negative. Occupancy by the twelfth regiment, and payment of rent from time to time by the officers of the city, cannot be treated as a ratification of a lease made without authority. To apply that rule to such case is to strip the defendants of all ability to defend themselves against acts of public officers

in excess of lawful authority. We are of opinion that the defendants are entitled to judgment.

DANIELS, J., concurred.

BRADY, J. :

The twelfth regiment applied for an armory, in compliance with the law thereunto relating at the time of the application, and one was provided. They were subsequently transferred to the armory occupied by them referred to in the complaint herein, and to recover the rent of which this action was brought. It is not pretended that any application was made under the provisions of the act of 1870, but the plaintiff relies upon the original application and its continuing force, as an authority to transfer them to any armory provided by the board of supervisors. It has, he claims, in other words, a retrospective effect, and so long as they present the necessary constituents of a regiment, the use of an armory by them must be regarded as an occupancy under and by virtue of the application duly and legally made, and therefore a legal and binding one upon the city. I think this question is evolved from the facts and circumstances of this case, and is to be met. Upon the view taken by my brethren, however, assuming it to present the controlling question involved on this appeal, I concur with them.

Judgment ordered for defendant on the verdict.

JAMES REID AND ANOTHER, RESPONDENTS, v. MICHAEL
MARTIN, APPELLANT.

Goods sold on credit — if sale is induced by fraud, action may be brought at once — in such case the fraud is a material issue — Order of arrest.

When goods are sold on credit, if the sale be induced by fraudulent misrepresentations, suit for the value may be commenced before the termination of the period of credit. In such action the question of fraud is material to the issue, and the judgment recovered therein will not be deemed to have been recovered in an action on contract.

APPEAL from an order made by honorable Justice DONOHUE, November 27, 1874, denying a motion for the discharge of the defendant from imprisonment on execution, and for a perpetual stay.

The action was brought to recover the value of certain liquors sold to the defendant, and, on the 19th day of February, 1870, by virtue of an order of arrest therein, defendant was arrested by the sheriff of Dutchess county. That order was obtained on the ground, among others, that the defendant had been guilty of a fraud in contracting the debt. Copies of the affidavits used to procure the arrest were served upon the defendant. On May 27, 1872, defendant filed a petition in bankruptcy.

On the 11th day of June, 1872, judgment was entered herein against the defendant, and, execution thereon against his property having been returned unsatisfied, execution was issued against the person of defendant, which was returned "not found."

On February 6, 1873, defendant was discharged in bankruptcy, and the debt in question is claimed to have been covered by such discharge.

Defendant gave bail on his arrest, and, after the return of the latter execution, an action was commenced against the bail, who were finally permitted to surrender the defendant to the sheriff in their exoneration.

W. S. Palmer, for the appellant. If the proceedings in bankruptcy operated to discharge this debt, the motion is a proper one. The discharge being obtained after judgment, it was too late to plead. (*Monroe v. Upton*, 50 N. Y., 593.) This debt is discharged unless it was fraudulently contracted. (Bankrupt Act, §§ 33, 34.) All the allegations of the complaint, charging fraud, are wholly irrelevant and immaterial; the complaint is essentially one for goods sold and delivered, without a single characteristic of a complaint for fraudulently obtaining goods. This position is sustained by a uniform current of authorities. (*Roth v. Palmer*, 27 Barb., 652; *Kayser v. Sichel*, 34 id., 84; *Wright v. Campbell*, 21 How., 9; *Weigand v. Sichel*, 33 id., 174; *Williams v. Tilt*, 36 N. Y., 319, 323.) The rule is unqualified, that the only matters established by the judgment are those which the plaintiff must have

proved to make out his case. (*Edward v. Gardner*, 45 N. Y., 349; *Wood v. Henry*, 40 id., 124; *Church of Redeemer v. Crawford*, 14 Abb. [N. S.], 200.) If a body execution would lie, it is because the judgment established a fraud—if not, because the judgment established no such thing. If there was any tort they have waived it. Having made their election they are bound by it. (*Lane v. Beam*, 19 Barb., 51.) There have been no laches. (*Monroe v. Upton*, 50 N. Y., 593.)

Wm. P. S. Melvin, for the respondents. The action is founded in fraud, from which the bankrupt's discharge will not release him. (*In re Kimball*, 1 Nat. Bankr. Reg., 193; *In re Louis Glazer*, id., 336; *In re Whithouse*, 4 id., 15.) And the honorable justice, before whom the motion was heard, from the decision in which this appeal is taken, says: "By the express terms of the bankrupt act, no debt contracted by fraud shall be discharged by the act. The act does not put the denial on the shape in which the debt is; it puts it on the ground of the character of its contraction." (*In re Paterson*, 1 Nat. Bankr. Reg., 307; *In re Robinson*, 2 Nat. Bankr. Reg., 341; *Dresser v. Brooks*, 3 Barb., 429; *Clark v. Rowling*, 3 N. Y., 216; *Monroe v. Upton*, 50 id., 593.) If the court can gather from the complaint and affidavits on arrest a state of facts which disclose a fraud in the creation of the debt, that is sufficient. (*In re Kimball*, 1 Nat. Bankr. Reg., 193; *Stewart v. Emerson*, 8 id.; *In re Simpson*, 2 id., 18.)

DAVIS, P. J.:

The motion was denied by the court below solely on the ground that the debt for which the judgment was recovered, was not discharged by the decree in bankruptcy, because it was contracted by fraud. Section 33 of the act of congress, known as the bankruptcy act, declares that "no debt created by the fraud * * * of the bankrupt * * * shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

The federal courts sitting in bankruptcy, have given this section a construction consistent with the manifest intention of congress. "Whenever the debt," says BLATCHFORD, J. (*In re Paterson*, 1

Nat. Bankr. Reg., 307), "no matter whether it be in the shape of a judgment or in any other form, was created by fraud and had its root and origin in fraud, then it is not to be discharged." We are to look, therefore, on such motions as this, to the origin of the indebtedness, and if, in so doing, we clearly see that the debt was created in fraud, we must hold the discharge to be inoperative to extinguish it, and that the creditor is entitled to all the remedies given him by the laws of the State in which his action may be prosecuted, or his judgment recovered.

In this case it is insisted that fraud is not the subject-matter of the action, and that therefore all the allegations of the complaint tending to show fraud in the creation of the debt, are immaterial, and that no issue could have been taken upon them, and therefore the judgment cannot be held to have determined anything in respect of them. It is true the complaint in this action is upon contract for the purchase-price of goods sold and delivered; but that fact is by no means conclusive upon the question whether or not the debt was created by fraud. It is well settled, that where goods are sold upon credit, if it appear, before the term of credit has expired, that the sale and credit have been procured by the fraud of the purchaser, the seller is not bound to wait for the expiration of the credit, but may instantly sue upon an implied promise to pay forthwith the value of the goods, and recover upon proof of the fraudulent acts or representations. The fraud is, in such case, necessarily involved in the issue as part of the evidence necessary to establish the right of recovery. Under the former system it would not be set forth in the pleadings, which would usually and might always have been simply the common counts *in indebitatus assumpsit*. Under the present system, the assertion of such allegations in the complaint, if unnecessary, would not be prejudicial to the defendant, and after issue of fact joined as in this case, would be obnoxious to no objection on the part of the defendant. In this case the plaintiffs sue for the whole purchase-price of the goods sold, and they show on the face of their complaint that the sale was made upon credit, payable by installments, varying from thirty days to four and one-half months from the date of the sale. The full term of credit had not expired when they brought their suit for the whole amount, and hence, as one

ground entitling them to an immediate recovery, they allege that they were induced to make the sale by certain false and fraudulent representations made by defendant, on the faith of which they relied. After issue joined, and judgment rendered upon such pleadings, it will hardly do to hold that the record shows that the recovery was upon a simple contract for a debt not created by fraud. But it appears by the papers that an order of arrest was made by one of the justices of this court, upon affidavits showing the case to be one within section 179 of the Code of Procedure. The affidavits upon which this order was founded, are brought before us without objection by the respondent, and it is fair to presume that they were also before the special term. The defendant was arrested on the order and gave bail, as is stated in his own affidavit. The affidavits abundantly show that the *debt was created by fraud*. There is no merger of the fraud in the judgment, so that the plaintiffs are precluded from establishing that fact. Their right to imprison the debtor may depend upon their ability to show an order of arrest, founded upon affidavits sufficient to give jurisdiction to make the order; and whenever a discharge after arrest is sought for, upon any ground which involves the power to enforce the judgment by that remedy, we think it competent to meet the effort by showing not only the primary order, but that the debt which has ripened into judgment, was created by fraud.

We are of opinion that it does appear that the debt in this case was one that is not discharged by the decree in bankruptcy and the bankrupt's discharge granted thereon. The order should be affirmed, with ten dollars costs, besides disbursements.

BRADY and DANIELS, JJ., concurred.

Ordered accordingly.

THE PEOPLE EX REL. AMOS H. TROWBRIDGE, ADMINIS-
TRATOR, AND ELIZABETH HARDEN, ADMINISTRATEIX, ETC.,
v. THE COMMISSIONERS OF TAXES AND ASSESS-
MENTS OF THE CITY AND COUNTY OF NEW YORK.

4	595
63	463
4	595
138a	546
4	595
31ap	599

Taxation—Shares of stock in foreign corporations—owners of, not personally subject to taxation thereon—Bonds—how taxed.

Residents of this State, owning shares of stock in a corporation created under and by the laws of this State, or of any foreign State, are not subject to be personally assessed and taxed thereon under the laws of this State.

Bonds, being evidence of a fixed indebtedness, are taxable at their actual value.

CERTIORARI to review the proceedings of the commissioners of taxes, in assessing the relators, as administrator and administratrix of George Harden, deceased.

John E. Burrill, for the relator. Under our statutes the assessment is made upon the property of the corporation and not upon the stockholder. (*Utica Co. v. Supervisors*, 1 Barb. Ch., 432; 1 R. S. [4th ed.], [marg. pag.] 388, §§ 1, 3; id., 714, §§ 1, 3; id. [marg. pag.], 415, §§ 6, 7, 10; id., 752, 753, §§ 6, 7, 10; *People v. Utica Co.*, 15 Johns., 382; *Indiana v. Woram*, 6 Hill, 33; *Mohawk Co. v. Clute*, 4 Paige, 384, 385; *Oswego Co. v. Dolloway*, 21 N. Y., 449.) Under the statutes of this State relating to taxation, the personal property of a resident actually situated in another State, is not to be included in the assessment here. (*People v. Commissioners of Taxes*, 23 N. Y., 224; *People v. Gardner*, 51 Barb., 352; *Pacific Mail Co. v. Assessors*, 47 How. Pr., 164.) Foreign corporations are inhabitants of the States by whose laws they are created, have no power of migration, and can exist only in the State of their origin. (*Merrick v. Van Santvoord*, 34 N. Y., 218, 219; *Stevens v. Phoenix Co.*, 41 id., 152-154; *Ohio and Miss. Co. v. Wheeler*, 1 Black [U. S.], 286; *Green v. Van Buskirk*, 7 Wall., 150.) Where a corporation is exempted by statute from taxation, the shareholders cannot be taxed on their stock. (*State v. Brannin*, 3 Zab., 484; *Tax Cases*, 12 Gill & J., 117; *Bank of Cape Fear v. Edwards*, 5 Ired., 516; *Johnson v. Commonwealth*, 7 Dana, 338.)

596 PEOPLE EX REL. TROWBRIDGE v. COM. OF TAXES.

FIRST DEPARTMENT, MAY TERM, 1875.

The Revised Statutes provide that the shareholder shall not be taxed in respect to his shares in any corporation whose capital stock is taxed. (1 R. S. [4th ed.], 388; *Water Power Co. v. Boston*, 9 Metc., 199; *Gardiner Cotton Co. v. Gardiner*, 5 Greenl., 133; *Salem Iron Factory v. Danvers*, 10 Mass., 514; *Smith v. Burley*, 9 N. H., 423; *Gordon v. Mayor of Baltimore*, 5 Gill, 231; *Tax Cases*, 12 Gill & J., 117.)

William Barnes, for the respondent.

DAVIS, P. J. :

This case is brought to a hearing upon the return of the respondents, and the facts therein stated are to be taken as true. (*People ex rel. Westbrook v. Ogdensburgh*, 48 N. Y., 390.) The return states that the relators, as administrator, etc., of the estate of George Harden, deceased, were assessed by the deputy tax commissioner in the sum of \$1,000,000 for personal property, and the same was entered in the annual record of assessed valuation of real and personal estate. That afterward, and in due time, the relators, claiming to be aggrieved by the assessment, made application to have the same corrected, and thereupon made the statement annexed to the return, marked "Schedule A," which, so far as the items of property are concerned, is as follows :

	Nominal value.
7,000 shares Mariposa preferred. No value.	
3,843 shares Chicago, R. I. and Pac.....	\$376,614 00
3,000 shares Quicksilver preferred.....	84,000 00
500 shares Mil. and St. Paul preferred	
do. do.	27,500 00
340 shares St. Louis, A. and Terre Haute	15,540 00
200 shares Wilkesbarre Coal Co	4,000 00
9,000 shares Mariposa certificates. No value or sales.	
19,000 North Carolina bonds. No value or sales.	
535 shares Mil. and St. Paul common.....	18,725 00
Cash, Jan. 1, 1874, deposited in U. S. Trust Co.....	148,000 00
Total nominal value.....	\$669,379 00
Claims as stated.....	115,000 00
	<u>\$554,379 00</u>

The relators also set forth in the schedule, that the stocks and securities above mentioned are the stocks of incorporated companies, and that, as relators believed, such companies are taxed and do pay a tax on their capital stock, and that there are claims and demands made against the estate, the extent of which are undetermined ; that they already amount to the sum of \$115,000, and may exceed the amount of money belonging to the estate.

The schedule was duly verified, and the relators claimed that the assessment should be corrected by wholly vacating the same. The respondents thereupon reduced the assessment from \$1,000,000 to \$500,000, which latter amount they determined to be the sum at which the relators, in their administrative capacity, were taxable for the year 1874. They ascertained and fixed that sum, by taking the sum given in schedule A, as the total nominal value of the personal property belonging to said estate, to wit, \$669,379 ; and deducting therefrom the ascertained claims against the estate, as set forth in schedule A, at \$115,000, and the further sum of \$54,379, to cover the amount of any unascertained claims.

We are of opinion that in determining the assessment in this case, the respondents proceeded upon erroneous principles. It was conceded by the respondents, on the argument, that the stocks, stated in the schedule as "3,000 shares Quicksilver preferred, nominal value \$84,000," are stocks in The Quicksilver Mining Corporation, created by and under the laws of this State, and having its principal place of business in the city of New York. The *certiorari* states that it was organized for the purpose of operating mines in the State of California, and that its property is in that State. Conceding this to be true, it is nevertheless a New York corporation, and taxable upon its capital stock, under the laws of this State, as provided by section 3 of chapter 456 of the Laws of 1857. (*Oswego County v. Dolloway*, 21 N. Y., 459 ; *People ex rel. Pacific Mail Co. v. Commissioners of Taxes*, 8 S. C. [1 Hun], 143 ; affirmed by Court of Appeals.) The shares of stock held by the relators in that corporation, were not taxable to them. (N. Y. Stat. at Large, vol. 1, 360, 361.) We are of opinion, also, that the commissioners erred in including in their assessment the stocks of corporations created by and under the laws of other States.

Such corporations are taxable, and we must presume, in the

absence of proof, that taxes in their respective home States, are duly assessed and collected upon their capital stock or property. The stocks in such corporations, held by individuals here, are simple representatives of capital or property employed in business in other States, the title of which is vested in, and controlled by, the artificial person created by and residing in such States. They represent an interest which is or may become a membership in the corporation, and evidence of a right to participate in divided profit, and in the ultimate dividend of surplus, after the payment of all debts and obligations of the corporation. The stock certificates are not themselves the property, but are evidences of the rights just mentioned, to be possessed, enjoyed and enforced, under and in conformity with the laws of the State which created the body corporate. The property of the corporation, whether real or personal, in which these certificates of legal or equitable rights are outstanding, is not "*within this State*," which, by the general statute, is the test of taxability; but if any portion of it were, that fact would not affect the question now before us, for then, under our statutes, it would be taxable here, because of its *situs*, to its possessor or owner, but not to the mere holders of stock in the corporation. We think the case is fairly within the principle of *The People ex rel. Hoyt v. The Commissioners of Taxes* (23 N. Y., 224), and *The People v. Gardner* (51 Barb., 352). The commissioners should therefore have excluded the stocks of foreign corporations, by which we mean the corporations created by the laws of other States.

The commissioners should not have deducted the sum of \$54,379 to cover unascertained claims. There was no evidence of any such indebtedness, and it was only stated as a mere conjecture, that such claims might be presented.

The commissioners will also be at liberty to inquire into the value of North Carolina bonds, which, being evidence of a fixed indebtedness, are taxable at their actual value.

The proceedings must be reversed, and the assessment remitted to the commissioners, with instructions to reassess the relators according to the suggestions herein expressed.

BRADY and DANIELS, JJ., concurred.

Ordered accordingly.

IN THE MATTER OF THE KINGSBRIDGE ROAD.

Appeal—from order of confirmation in street opening proceedings—when may be taken to General Term—Notice of—upon whom served—chap. 585 of 1865—chap. 86 of 1818—chap. 270 of 1854.

An appeal may be taken to the General Term of the Supreme Court, from an order confirming the report of commissioners in proceedings had relative to the opening of streets in the city of New York, under chapter 585 of the Laws of 1865, which adopts the provisions of chapter 86 of the Laws of 1818.

Whether the provisions of the act of 1818, that the report of the commissioners, when confirmed, should be final and conclusive, considered under the circumstance that such order of confirmation was then made by a court consisting of three judges, would prevent an appeal to the General Term from an order which may now be made by a single judge, *quære*.

Chapter 270 of the Laws of 1854, authorizes an appeal to the General Term in such cases; but no appeal lies from the decision of the General Term to the Court of Appeals.

In such proceedings the municipal corporation which seeks to acquire the title *in invitum* to lands for a public highway, and to make assessments upon parties benefited, etc., is, in a legal sense, the adverse party in respect to all persons affected by the proceedings, and the several persons whose property is taken or assessed, are not, in a legal sense, "adverse parties" to each other, and service of a notice of appeal on the clerk of the court and the corporation counsel in such cases is sufficient.

MOTION to dismiss the appeal of James Lynch from the order of the Special Term, confirming the report of commissioners of estimate and assessment, made in an application of the department of public parks, for and in behalf of the mayor, aldermen, and commonalty of the city of New York, relative to the opening of Kingsbridge road northwardly from the southerly line of One Hundred and Fifty-fifth street to the Harlem river, as laid out by the commissioners of the Central park of the city of New York.

Granville P. Hawes, Geo. H. Adams, James C. Carter, Grata Nathan, Kitchell & Jelliffe, and others, for the motion.

James A. Deering and *A. H. Purdy*, opposed.

DAVIS, P. J.:

This motion is made upon two grounds: First, that the order is not appealable; second, that notice of appeal has not been given

to all the parties interested in the confirmation of the report. The notice of appeal was served upon the clerk of the court, and upon the corporation counsel, by whom, as representing the mayor, aldermen, etc., and the commissioners of the Central park, the proceedings to acquire the lands and open the street are conducted, and the motion of confirmation was made. In our opinion this service was regular and sufficient.

The municipal corporation which is seeking by proceedings under the law, to acquire title *in invitum* to lands for a public highway, and to make assessments upon parties benefited, and compensation to parties injured, is, in a legal sense, the adverse party in respect of all persons affected by the proceedings; and the several persons whose property is taken or assessed are not, in a legal sense, "adverse parties" to each other. They have a common adversary in a controversy in, which they may have divers interests, which may, in some cases, be hostile to each other in practical effects and results, yet they have no adjudications as between themselves for or against each other, and so far as they are severally interested in maintaining the adjudication which the city has obtained against them all, the corporation must be regarded as their representative in a contest between it and the persons who deem themselves prejudiced by such adjudication.

The first point is one of graver importance. The proceedings in this case were taken under the provisions of chapter 565 of the laws of 1865. (Sess. Laws of 1865, 1136.) That act adopts and applies, so far as they are not inconsistent with its own provisions, the several acts and the proceedings thereunder, relating to the opening of streets, roads and public squares, then in force in the city of New York. All parties on this motion have acted upon the assumption that the provision of the act of 1813, declaring the effect of the order of confirmation, is in full force in this case. Section 178 of the act of 1813, provides that the commissioners of estimate and assessment shall make a report of their proceedings "to the Supreme Court of Judicature," and that "such report, when confirmed by the said court, shall be final and conclusive, as well upon the said mayor, aldermen and commonalty of the city of New York, as upon the owners, lessees, persons and parties interested in, and entitled to the lands, tenements, heredita-

ments and premises mentioned in the said report, and upon all other persons whomsoever."

It is upon the effect of this provision, considered of course in the light of subsequent legislation and existing circumstances, that the question whether an appeal from the order of confirmation made by the Special Term, can be taken to the General Term of the Supreme Court. The power to make such *final* and *conclusive* order of confirmation, was conferred by the act of 1813, upon the Supreme Court of Judicature. That court then consisted of a single body, composed of three judges, who then held a single term, comprising within itself all the powers, so far as they then existed, which are now distributed amongst the several branches and terms of the same court. It was at that term (which, for the sake of distinction, we may now call a General Term), to which the power to make the final and conclusive order was given.

There is no doubt from the language used by the act, that the intention was to preclude an appeal from such an order of confirmation from the Supreme Court to the then appellate tribunal; and there seems just as little, that the intention was to give the characteristic of finality and conclusiveness to the order by a term of the Supreme Court having as well the original as the ultimate authority of that court.

If the powers of the Supreme Court had been subdivided as now, it may well be questioned whether the order of a single judge sitting at Special Term and disposing of interests and rights so vast and complicated as those involved in some of this class of cases, would have been made final and conclusive upon all parties and persons. But the changes in the courts were not anticipated, and language was used, therefore, which then fitted the orders of a General Term only, but which is now to be fitted to the orders of a Special Term held by a single judge. But this fact is not so much an argument against the application of the language of the act of 1813 to the orders of Special Terms, as in favor of such construction of subsequent legislation touching appeals from orders as shall embrace those made in this class of cases. If the Special Term of the Supreme Court were an inferior tribunal, language as emphatic as that contained in the statute of 1813 would not deprive a party of the right of review. (*Matter of*

Canal and Walker Streets, 12 N. Y., 406; 2 Keble, 43; 2 Burr., 1040; *Lawton v. Commissioners*, 2 Caines, 179, 181.)

In the Supreme Court "the right of review, being a fundamental one, is always deemed to exist, unless the intent to destroy it is expressed with irresistible clearness." (Per HILL, *arguendo*, in *Matter of Canal Street*, 12 N. Y., 408; citing 2 Cranch, 390, MARSHALL, C. J.; *Lawton v. Commissioners*, 2 Caines, 179; *Rex v. Commissioners*, 2 Keble, 43; *Rex v. Morely*, 2 Burr., 1040, 1042; 3 Hill, 562, COWEN, J.; *Starr v. Trustees*, 6 Wend., 564.) When the changes in the organization of the Supreme Court became such that a Special Term could entertain motions for confirmation under the act of 1813, it would necessarily have followed that, had not the Special Term been, so far as its powers extended, a branch of the Supreme Court itself, clothed with co-ordinate authority, the principle of law above referred to would have kept alive the powers of review in the General Term, notwithstanding the act of 1813 declares the order when made to be final and conclusive.

But the conferring on the Special Term of power to make the order, under the act of 1813, undoubtedly gave to the order of that court the effect declared by the act. Hence, to enable it to be reviewed, required legislation which should, *pro tanto*, operate to modify the effect of the order. The act of 1854 seems to us to have been enacted expressly to accomplish such a purpose—that is, to subject orders of the Special Terms to review in this and other classes of cases which might not be embraced in the more general provisions of the Code.

The first section of the act of 1854 provides that "an appeal may be taken to the General Term of the Supreme Court, or the Superior Court, or Court of Common Pleas of the City of New York, from any judgment, order or final determination made at a Special Term of either of said courts, in any special proceedings therein." (Session Laws 1854, chap. 270, p. 592.)

There seems to us no propriety in frittering away the force of this statute by a judicial incorporation of exceptions which the legislature did not see fit to make.

The statute was obviously made for the express purpose of permitting a review of orders in all special proceedings, when made

in the Special Term, and there seems to be greater reason for applying it to the case of orders which could only have been made by a General Term, when language in respect of them was used by the legislature which made them not appealable from the latter court. It is to be observed that the act of 1854 gives no appeal except to the General Term, and the right of review terminates under it, in this kind of cases, precisely where the order which was to be final and conclusive was, by the act of 1813, to be made. So that, under the act of 1813, *the order of the Supreme Court* is still final and conclusive, precisely as originally contemplated.

But we think the question of the application of the act of 1854 to such cases ought to be regarded as authoritatively settled. In *The Matter of Canal and Walker Streets* (above cited), the order of confirmation was made at a Special Term in *December*, 1853; an appeal was taken, and, in *September*, 1854, the General Term affirmed the order. From the latter order an appeal was taken to the Court of Appeals, and a motion was made in the last named court to dismiss that appeal.

The act of 1854 was passed, April 15, 1854, pending the appeal in the Supreme Court, from the Special Term order of December, 1853. The act contains this provision: "And all appeals heretofore had or taken, and undetermined in special proceedings, shall be as valid and effectual as though had or taken under the provisions of this act." These facts and dates show, almost to a moral certainty, that the act of 1854 was passed expressly to meet and make valid the appeal then pending in the Canal street case, which was one of great importance.

The motion to dismiss came on speedily in the Court of Appeals, and that court, as stated in the head note of Mr. Kernan, held that, "by virtue of chapter 270 of the Laws of 1854, an appeal lies to the Supreme Court at General Term, from an order made by the same court at Special Term, confirming the report of the commissioners." GARDINER, C. J., in delivering the opinion of the court, held that the act of 1854 gave an appeal to the General Term of the Supreme Court, and that, "independently of that statute, the General Term acquired no jurisdiction of the proceedings." (12 N. Y., 409.) He exploded the idea that in exercising the powers conferred by the statute of 1813, the court acted as "a subordinate

tribunal of special and limited jurisdiction, to be exercised by those who were, *ex officio*, judges of that court," and held that the order of the Special Term was *an order of the Supreme Court*, to which the act of 1854 had application; and he further held, in substance, that to the *order of the General Term*, in such case, the language of the statute of 1813, declaring it "final and conclusive," still applied, so that no appeal would lie therefrom to the Court of Appeals, inasmuch as the act of 1854 gave an appeal *only* to the General Term of the Supreme Court. This contemporaneous construction of the act of 1854, ought, as it seems to us, to have been regarded as settling the right of appeal in this class of cases, but it seems to have been held otherwise by the General Term of the first district *In re Bowery* (12 How., 97), in which case the appeal was dismissed, and in *The matter of Sixty-fifth Street* (23 How., 256), the same view seems to have been expressed.

But in the last case in this court (*Matter of Riverside Park*, 61 Barb., 40), the question underwent careful review, with all the former rulings in consideration, and this court held that such an order of confirmation was appealable under the act of 1854. This last decision, we think, gives its legitimate effect to the statute of 1854. It is attacked by counsel because some of the authorities cited are not precisely analogous in principle or in facts. It is enough, however, to say that it has the cases of *The matter of Canal and Walker Streets* (*ubi supra*), and *King v. The Mayor* (36 N. Y., 190), to uphold it, and no authority in the Court of Appeals has been cited which conflicts with it. The case of *King v. The Mayor* is directly in point. In that case the report of the commissioners was confirmed at Special Term; an appeal from the order to the General Term was dismissed, and a writ of error was brought to the Court of Appeals from the order of dismissal. The opinion of the court, pronounced by DAVIES, C. J., in which all the judges concurred, says: "*We have no doubt that the order made in this matter was appealable to the General Term of the Supreme Court, and that the order or judgment which the statute declares to be final and conclusive, is that which the Supreme Court finally makes in the matter. Such has been the uniform practice in matters of this kind. * * * It was the duty of the General Term, therefore, to have heard the appeal, and not to have dismissed it.*" If that order had been brought to this

court by *appeal*, we should have reversed it on this ground alone, upon the authority of the cases of *The People v. New York Central Railroad Company* (29 N. Y., 418), and *Bank of Geneva v. Reynolds* (33 id., 160), and other cases in which the rule there laid down has been followed."

Thus it will be seen that the court not only distinctly held that the order was appealable, but that an order of the General Term dismissing the appeal on the ground of supposed want of power to entertain it, would have been reversed on the ground of error in such dismissal, if the correct practice of an appeal from the order had been pursued; but as a *writ of error* was not an appropriate remedy, that process was dismissed.

The views expressed by the learned chief justice have additional force, from the fact that he had himself filled the office of corporation counsel, and had had opportunity to become familiar with the practice in such cases. It is urged that these cases are shaken by subsequent decisions of the Court of Appeals, and *The Mayor, etc., v. Erben* (38 N. Y., 305), and *The Matter of the Commissioners of Central Park* (50 id., 493), are cited as sustaining that view.

There are several reasons why *The Mayor v. Erben* is not an authority to that effect: First. No such question was involved in the case, it being an action to recover on overpayment on an award of damages, in which the conclusiveness of the report as confirmed only arose collaterally, and no question whether the appeal could have been taken was in any wise involved. Second. The opinion of HUNT, C. J., published in 38 New York (page 305), was the dissenting opinion, and not that of the court; and the decision of the court was directly contrary to the views of Judge HUNT, and the publication of the opinion as that of the court was a blunder of the reporter. [This correction is made by a foot note in the last edition of the volume, at page 311.] And lastly, the remark of HUNT, C. J., was obviously a hasty one, having in view nothing further than the right to look behind an order of confirmation, in such a case as that under his consideration.

The Matter of the Commissioners of Central Park (50 N. Y., 493), involved nothing but the question whether the Code (as amended), gave an appeal to the Court of Appeals, from an order of the General Term confirming the report of commissioners.

From the case, as reported, it would seem that the motion for confirmation was made in the *first instance* at General Term, as doubtless it may be, unless directed by the court, by some general or special rule, to be heard at Special Term; and the court held that the general provisions of the Code relating to appeals to the Court of Appeals, did not authorize an appeal from an order made under section 178, chapter 86 of the Laws of 1813, and thereby declared to be final and conclusive. As the statute of 1854 had no application whatever to the Court of Appeals, it was neither considered nor cited, nor in any wise referred to by counsel, nor by the court; but the cases above cited (12 N. Y., 406 and 36 id., 182), are cited approvingly, and no suggestion is made that the ruling in those cases, that an appeal would lie from the Special to the General Term of the Supreme Court, is open to animadversion. The case can only be said to hold that the questions embraced in the report of the commissioners, "should be finally and conclusively determined by the Supreme Court, without further appeal or right of review or ulterior litigation, and hence cannot in any form be brought into the court of last resort."

The motion to dismiss the appeal should be denied with ten dollars costs, besides disbursements."

BRADY and DANIELS, JJ., concurred.

Motion denied, with ten dollars costs, besides disbursements.

HERVEY ROCKWELL AND ANOTHER, SURVIVING EXECUTORS,
ETC., RESPONDENTS, v. FLORENCE GEERY AND OTHERS,
APPELLANTS.

Claim against deceased — proceedings to enforce payment of, against heir and devisee in case of default of personal estate — what constitutes such default — Judgment against executor — conclusive as to what, in proceedings against heirs and devisees — Posthumous child — does not occupy position of heir as to devisees.

In an action brought to recover payment of a claim out of real estate belonging to the estate of a deceased debtor, heirs at law and devisees may be properly joined together as parties defendant, if the complaint allege that the real estate which passed to the heirs at law is insufficient to satisfy the claim; and in such case the

judgment may be so framed as to direct that the estate which descended to the heirs at law be first exhausted.

The fact that a disputed, litigated claim remains in the hands of his executors, does not prevent a creditor from proceeding against the heirs and devisees of the deceased. The fact that subsequently to the commencement of proceedings against the heirs and devisees, the executors recovered judgment in the matter thus in litigation, and sales were had thereunder, in partial satisfaction thereof, does not defeat the proceedings.

If a judgment is recovered against executors it has the effect of reducing to the amount of such judgment the claim against the deceased when it is sought to be satisfied out of real estate in the hands of his heirs and devisees, although such claim may be proved, in the proceeding against the heirs and devisees, to exist for a greater amount than the judgment. The true basis of apportionment in such cases, is the value of the respective pieces of real estate at the time of the death of the testator.

The design of the statute, in reference to posthumous children, was to give them the same portion precisely as they would have if the parent had died intestate, and where the children are the devisees, the object of the statute can only be accomplished by requiring each to contribute, in proportion to his devise, to make up such share of the property as would have gone to the after-born in case of intestacy, and subjecting each devisee to the same burdens as the after-born in proportion to the estate held: *i. e.*, to contribute proportionally toward the payment of any claim against the deceased, to enforce which proceedings are taken against the devisees and heir in default of personal property.

APPEAL from a judgment entered on the report of a referee.

E. T. Rice, Charles B. Rice and Walter L. Livingston, for the appellants.

Charles H. Mundy, for the respondent.

DAVIS, P. J.:

This is an action brought by the surviving executors of Charles O'Neil, to reach the real estate of Isaac Geery, deceased, now held by seven of his children as devisees of separate parcels under his will, and by Florence Geery, a posthumous child, to whom an equal undivided one-eighth of all the real estate of said Isaac Geery is claimed to have descended as heir at law. Isaac Geery was co-executor of the plaintiffs, and the indebtedness which plaintiffs claim to recover is alleged to be for moneys of O'Neil's estate, secured by him and applied to his own use. On the part of the devisees it is insisted, that a joint action cannot be brought

under the statute against both heirs and devisees, because the statute provides, in substance, that no recovery shall be had against devisees until the creditor shall have exhausted his remedy against the heirs. (2 R. S. [Edm. ed.], 474, § 52.) In the view the learned referee has taken of this question, it is of no importance in the case. He has held, in substance, that all the defendants are devisees, and so are properly joined by the express requirements of the statute. He regards the posthumous child not as heir at law, and taking in that capacity, but as a "statutory devisee," and entitled therefore, in respect of her equal undivided one-eighth of the real estate of which her father died seized, to stand on the same footing as her several brothers and sisters, named in said will as devisees. Whether this view can be maintained, will be hereafter considered. But regarding Florence as an heir at law, we see no objection in uniting the devisees with her in the action, under the averments of the complaint. It is distinctly averred that the interest in the real estate which has descended to her, is not sufficient to pay the indebtedness to plaintiff; and this is found as a fact by the referee. If, therefore, she is to be treated simply as an heir at law, there is little difficulty in so framing the judgment as to direct that the estate which Florence has taken as heir at law, be first exhausted, and then apportioning the residue upon lands severally devised to the devisees. In this mode the statute can be executed without the necessity of several actions. This course was approved by the chancellor in *Schermerhorn, Exec., v. Barhydt* (9 Paige, 28), and seems to be consistent with the language of the statute. (2 R. S., 455, § 56; and see, also, *Butts v. Genung*, 6 Paige, 254.) The chancellor does not, as it seems to us, express any views in *Wambaugh v. Gates* (11 Paige, 505) which are in conflict with *Schermerhorn v. Barhydt*.

On the behalf of all the appellants, it is urged that the plaintiffs had not, at the time of commencing this action, exhausted their remedy against the personal assets of Isaac Geery. The plaintiffs had sued the executors of Isaac Geery, and recovered a judgment upon which nothing had been realized. An accounting had been had before the surrogate, in which this judgment was set down and recognized as an indebtedness of the estate. The accounting showed that nothing remained in the hands of the

executors, out of which the judgment or any portion could be paid. It appeared on this accounting, however, that a large disputed claim of the testator against the firm of J. & W. Geery, nominally sufficient to pay all the debts of the testator, was remaining in the hands of the executors. Nothing had been collected upon it, and the surviving partner disputed and litigated his liability. Three years had elapsed before this action was brought, after the granting of letters testamentary; and at that time nothing remained in the hands of the executors with which the indebtedness to plaintiffs, or any part thereof, could be paid. We think the requirements of the statute were substantially complied with, and that the fact that a disputed and litigated claim remained undecided, was not in itself sufficient to prevent the plaintiffs from proceeding against the heir and devisees.

It appears in the case, and is found by the referee, that while this action has been pending, a judgment has been recovered by the executors of Isaac Geery against his surviving partner, establishing the liability of the latter, and directing an accounting, and appointing a receiver of the property of the late firm; and that a considerable amount of real estate has been sold under such judgment, which has been bought in by the executors of Isaac Geery, and is in their hands as assets.

These facts, we think, are no defense to this action. The rights of the parties must be determined by the state of facts existing at the commencement of the action; and if the condition of things was at that time such that the right to sue under the statute had arisen, a subsequent change in the assets will not defeat the proceeding. But the court has complete control of the case; and upon its being shown that the representatives of the estate have received assets that ought to be applied to the payment of indebtedness, the court can make such orders touching the execution of its judgment as will enable the defendants to be relieved wholly or in part by the application of such assets. This accords, we think, with the principles laid down by the chancellor in *Graham v. Dickinson* (3 Barb. Ch., 169) and the cases therein cited.

The rights of the heir and devisees, if the judgment in this case be collected of them, would be protected upon the principle of subrogation, if, after such suit, assets came to the hands of the execu-

tors. And if such assets come before the collection of the judgment, there is no reason why the court should not interfere for their protection, by making such directions as may, upon the facts shown on the application, be shown to be just and equitable. It is quite another thing, however, to arrest or defeat the recovery on such a ground.

The proof of the indebtedness of the estate to plaintiffs was sufficient. The plaintiffs put in evidence the judgment recovered by them against the executors of Isaac Geery. This, perhaps, was not evidence of the indebtedness as against these defendants; but it was competent as tending to show what steps had been taken to reach the assets of the estate, and as bearing on the question whether efforts to collect from the personal estate of the decedent had been exhausted. This evidence was supplemented by proof of the account kept by Isaac Geery himself, which showed certain moneys received and an amount expended by him; and it is upon this proof of indebtedness that the referee has proceeded in rendering his judgment.

The recovery against the executors was for a less amount than the recovery against these defendants. We think the referee should have limited the recovery to the same sum and interest and the costs of the judgment, because that judgment fixed the amount for which the assets of the estate in the hands of the representatives were liable, and as to which there could be a deficiency of assets. It was competent, we think, for the defendant to use the record in the case to establish that the claim of plaintiffs which could be enforced against them was not greater than that recovery. It is apparent that the indebtedness proved by the account and that recovered in the judgment were identical. We must assume that the sum was reduced by some credit or defense to the amount of the judgment. After the recovery of the judgment all the claims became merged in it, and the judgment was the conclusive evidence, as between plaintiffs and the executors, of the extent of the indebtedness. No greater amount could be collected out of the personal assets; and if that amount had been collected out of personal assets, no action could have been maintained against these defendants for the difference between the judgment and the account for which it was recovered. As to such balance it would be impossible

to show that the personal assets had been exhausted, because, for that difference no remedy could have been had by plaintiffs against such assets. The referee should therefore have taken the recovery in the judgment as conclusive of the amount of the indebtedness, when it was shown *dehors* the record, that it was recovered for an actual indebtedness, identical in its character with that alleged in this action. A reduction must be made in the judgment accordingly.

The referee rightly disposed of the question made as to the widow's right of dower. It is presumed, after this lapse of time, that she elected the provisions of the will, and had no right of dower; besides, the right is not an estate vested in her until admeasurement, and may never become an estate in any portion of the lands. The defendants who wished to avail themselves of it should have shown more than now appears, in order to make the point of any effect.

This brings us to the question whether Florence Geery takes her estate as heir at law within the meaning of the statute which forbids proceedings against devisees unless the estate descended to heirs shall have been first exhausted. The statute provides that, "whenever a testator shall have a child born after the making of his will, either in his lifetime or after his death, and shall die leaving such child so after-born unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate as would have descended or been distributed to such child if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will." (2 R. S., 65, § 49.) Florence Geery comes within the provisions of this section, and, *as to her*, Isaac Geery, her father, died intestate. Another section of the Revised Statutes provides that, "in cases where, by the provisions of any statute, a child born after the making of the will shall be entitled to succeed to a portion of the testator's real and personal estate, such child * * * shall, in all respects, be liable in the same manner and to the same extent to the creditors of his ancestor in respect to the personal property delivered to him and the real estate descended to

him, as are herein prescribed in relation to next of kin and heirs." A keen sense of the hardship which the application of these statutes according to their strict letter would work upon the infant, Florence Geery, has led the referee to treat her as standing on the same footing toward her brothers and sisters, in respect of the payment of the debts of their father, as though he had died wholly intestate. It is very difficult for me to see upon what grounds this construction of the several statutes can securely stand, but my brethren are of opinion (as more fully expressed in the opinion of BRADY, J.), that the spirit of the statute permits and requires a construction that will subject all the real estate of the decedent to bear equally the burden of his debts, and thus prevent the gross injustice of taking from Florence her entire inheritance. They are in favor, therefore, of affirming the views of the referee on this point; and I am quite content that such views should prevail. The true basis of apportionment in such a case is, we think, the value of the respective parcels at the time of the death of the testator. Any other rule is too uncertain, and subject to too many fluctuations which may work injustice among the devisees or heirs, to be safely adopted. The "extent of the estate" which the heir or devisee receives by will or by inheritance, is the value at the time the same vests by the devise, or by operation of law. The judgment must therefore be reversed and the proceedings remanded to the referee, with instructions to proceed in conformity with the views herein expressed.

DANIELS, J., concurred.

BRADY, J. :

The design of the statutes in reference to posthumous children, was to give them the same portion precisely as they would have if the parent had died intestate, and hence the provision that descendants and relatives of the intestate begotten before his death but born thereafter shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate and had survived him. (3 R. S. [5th ed.], 43, § 18.) And hence the further provision, that whenever a testator shall have a child born after the making of his will, either in his lifetime or after his death,

and shall die leaving such child so after-born unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate as would have descended or been distributed to such child if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the part devised and bequeathed to them by such will. (3 R. S. [5th ed.], pp. 145, 146, § 44.) When the children are the devisees, the object of the statute can only be accomplished by requiring each to contribute in proportion to his devise to make up such share of the property as would have gone to the after-born in case of intestacy, and subjecting each devisee to the same burdens as the after-born, in proportion to the estate held.

To carve out of the devised estate a portion for the heirs at law, and to subject it to the grasp of the creditors, would defeat the benign intent of the legislature, and destroy that *quasi* equality which it was obviously designed to accomplish. When, therefore, the children are the devisees, they become, under its operation, heirs at law to the extent of their devise, so far as the after-born child is concerned, and, as to him, must bear the burdens of their estate. The statutory object in view, makes it wholly immaterial whether the posthumous child is called heir or devisee, and equally immaterial whether the devisees are regarded as such *eo nomine* or heirs at law.

The legislature appropriates as an act of justice, and in presumed accord with what would have been done by the testator, such parts of their devise, consistent with the whole estate, as may be necessary to give the after-born an equal share of the whole of the testator's property, subject to distribution and division; and it operates as a repeal, by implication, of all conflicting statutes.

It was not intended that any one child should bear a heavier burden than another, except so far as there might be an inequality in the value of the devise, and then it would result from the will of the testator, and not so much from legislative intent.

This view is in perfect harmony with the spirit of the statute, and what is within the spirit is within the letter, and is the true exposition of its meaning and design. I think the children should

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contribute ratably to the payment of the plaintiffs' claim; and that this action should, in its result, attain such object, all parties being present in court.

Judgment reversed and case remanded to referee.

RHESA BRONSON, APPELLANT, v. ANTHONY W. DIMOCK,
RESPONDENT.

Trustee of manufacturing corporation — failure of, to file report — when action cannot be maintained against.

An action cannot be maintained against a trustee of a mining company for a failure to file the report required by section 12 of the act of 1848, by the assignee of a demand, which, at the time of the failure to file the report, belonged to the president of the company who was one of the trustees.

Briggs v. Easterly (62 Barb., 51) followed; *Bolen v. Crosby* (49 N. Y., 183) distinguished.

APPEAL from an order sustaining a demurrer.

A. J. Perry, for the appellant.

Geo. Putnam Smith, for the respondent.

DAVIS, P. J.:

The appellant's points concede in substance that the plaintiffs assignor was president, and a trustee of The New York and Pennsylvania Petroleum and Mining Company at the time of the neglect of the president and trustees of the company to make and file the annual report as required by the twelfth section of the act. It is averred in the complaint that the company did not make the report for the years 1869, 1870 and 1871, as required by section 12 of the act, and as that section requires the report to be "signed by the president and a majority of the trustees, and verified by the oath of the president or secretary," the averment involves a charge of negligence upon all the trustees which of course includes the plaintiff's assignor. Upon the allegations of the complaint the assignor of plaintiff stands as *particeps criminis* in the neglect of duty which under the provisions of the act makes all the trustees jointly and severally liable. If any facts existed which took him out of

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4	614
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that relation they should have been averred. It was with this view that the learned justice at Special Term upheld the demurrer. We think his conclusion was correct and adopt his opinion as our own.

The order appealed from should be affirmed with costs, with the usual leave to amend, on payment of costs.

DANIELS and BRADY, JJ., concurred.

The following opinion was delivered at the Special Term.

VAN BRUNT, J.:

The question involved in this case is: Can an action be maintained upon a demand by an assignee thereof against a trustee of a mining company for failure to file the annual report, which demand belonged, at the time of the failure to file such report, to the president of the company, who was, of course, one of its trustees? The case of *Briggs v. Easterly* (62 Barb., 51), decides the precise point, and it is held that such an action cannot be maintained. That, although such claims may be within the letter of the act, yet, not being within the mischiefs intended to be prevented or remedied by it, nor within its spirit and intention, they are not within its provisions. One trustee cannot be made liable for the demands of his co-trustees against the corporation, on account of the failure of the trustees to file the annual report, because where both are equally at fault, the condition of the defendant is preferable. In answer to the above case, my attention has been called to the case of *Bolen v. Crosby* (49 N. Y., 183), which decided that such an action could be maintained by the assignee of a secretary of a company. The decision of that case seems to have been placed upon the ground that the secretary of the company was but its servant, performing such duties as were incident to his office. That, although under the direction of the trustees, he might prepare the paper and verify it, yet he could not in any way make it the act of the corporation and a compliance with the statute so as to relieve the trustees from their liability.

The court say that there is no evidence that the plaintiff omitted to perform any duty which devolved upon him, or that the failure of the trustees to make the report was in any way caused by or

attributed to him. In other words, he was not in duty bound to make the report, and he was not in fault because it had not been made. In the case now under consideration, as in the case of *Briggs v. Easterly*, already cited, the assignor of the claim was a trustee; upon him had devolved the duty of seeing that the annual report was filed, and the cause of action, if any, arose partly through his own neglect to perform a duty which the law devolved upon him. The president of these corporations must be selected from the number of its trustees, and, the complaint showing that the assignor was president, we must presume that he was also trustee. I think, therefore, that the case of *Bolen v. Crosby* is distinguishable from the case of *Briggs v. Easterly*, and that the decision in the latter case must control. Of course, if the complaint should show that the assignor of the cause of action had ceased to be a trustee or president before the failure to file the annual report, the reasoning of the case of *Briggs v. Easterly* would not apply.

The demurrer must be sustained, plaintiff to have leave to amend his complaint upon payment of costs.

Order affirmed, with costs, with leave to amend on payment of costs.

EDMUND COFFIN, APPELLANT, v. RICHARD COKE AND
OTHERS, RESPONDENTS.

Extra allowance—may be granted when no trial is had—Code, § 309.

In difficult and extraordinary cases an additional allowance may be made under section 309 of the Code, where the plaintiff discontinues the action before trial on payment of costs.

APPEAL from an order made at the Special Term granting an extra allowance to the defendants.

In this action the summons and complaint had been served on some of the defendants; demurrers had been put in by the same attorneys for all; a motion had been made for a preliminary injunction and denied, and on appeal to the General Term the order denying the injunction had been affirmed. The plaintiff there-

upon offered to give to the defendants a consent of discontinuance, and to pay them their taxable costs and disbursements. Whereupon the defendants made this motion, and an extra allowance was granted them.

Edmund Coffin, Jr., for the appellant. No allowance under section 309 of the Code, can be given until the final determination of the matter in controversy. (*Powers v. Wolcott*, 12 How., 565; *Merchants' Exchange Bank v. Commercial Warehouse Co.*, 3 Jones & Spencer, 214.) And this final determination must be by the recovery of a judgment on the part of the party claiming the allowance. The plaintiff can have no extra allowance where he is prevented from obtaining a judgment by a tender of amount due and costs. (*Brace v. Beatty*, 7 Abb., 445; *Pratt v. Conkey*, 15 How., 27; *Bostwick v. Tioga R. R. Co.*, 17 How., 456.) Nor unless the determination of the action gives him an actual recovery. (*Commissioners of Pilots v. Spofford*, 3 Hun, 57, 59.) The plaintiff had a right, at any time before judgment, to discontinue, as a matter of course, on payment of the taxable costs up to that point in the litigation. (2 R. S., p. 613, § 1; *Rees v. Van Patten*, 13 How., 258; *Cooke v. Beach*, 25 id., 356; *Seaboard and Roanoke R. R. Co., v. Ward*, 18 Barb., 595; *Pennel v. Wilson*, 5 Robt., 661.)

Rastus S. Ransom, for the respondents.

DAVIS, P. J.:

The only question on this appeal is whether an additional allowance may be granted by the court where the plaintiff discontinues the action on payment of costs.

It is not doubted that this case was difficult and extraordinary within the meaning of the Code. A defense had been interposed. The merits were involved in the motion for injunction which came before this court on appeal, and was fully discussed by the respective counsel and considered by the court. After a decision adversely to the plaintiff, he served notice of discontinuance on payment of costs. This entitled the defendant to tax *final* costs in the action. An additional allowance when properly granted becomes a part of the

costs of the action awarded by the Code to the successful party. (*Commissioners of Pilots v. Spofford*, 10 S. C., 57.) Such allowance when granted is within the word "costs," as used in section 385 of the Code. (*Coates v. Goddard*, 2 Jones & Spencer, 118.)

The following cases seem to justify an allowance when a plaintiff voluntarily submits to a nonsuit or discontinues after issue joined: *Allaire v. Lee* (4 Duer, 609); *Danenhovser v. March* (4 Abb., 254); *Woods v. Illinois Central R. R.* (20 How. Pr., 285).

As the Code now stands a *trial* is not a necessary element when a defense has been interposed in a difficult and extraordinary case; nor do we deem it necessary that a judgment should be actually entered.

It is enough if the plaintiff has terminated the action in such form that the defendant can lawfully claim the payment of his costs on such termination and enforce their payment in any mode known to the practice.

The order should be affirmed with ten dollars costs, besides disbursements.

BRADY and DANIELS, JJ., concurred.

Order affirmed with ten dollars costs, besides disbursements.

MEMORANDA

OF

CASES NOT REPORTED IN FULL

CAMBRIDGE LIVINGSTON, EXECUTOR OF, ETC., RESPONDENT,
v. AGNES MURRAY, IMPEADED, ETC., APPELLANT.

Will—life estate—trustee of.

The plaintiff's testator by his will provided: "Secondly. All the rest of my estate, of whatsoever kind, I hereby direct shall be divided equally among all my children, and in case of their death before me, among their lawful issue, the share of the child or children so dying shall go and be divided among his or her children; and it is my wish that my executors cause the portion that may belong to my daughters to be secured to them for their separate use during their natural lives, free from the control of any husband with whom they have been or may at any time be intermarried, and in case of their dying without issue, such portion of their said property as may remain at the time of her or their death, shall revert to her or their surviving brothers and sisters, or their issue in case of their death, as hereinbefore provided for. Subject, however, to the right of such daughter to dispose of one-half of such property by will in such manner as she may think proper."

By a codicil thereto he further directed: "Sixth. Inasmuch as there may be some obscurity in my said last will and testament, as to the title to the portions given to my children, I do hereby give, devise and bequeath * * * to my daughters, an estate for life, remainder to the lawful issue of each respectively, if any such they leave, in fee simple and absolutely, subject to the right of my said daughters to dispose of one-half of their share by will, as in my said last will and testament provided, and also subject, however, to the power in trust to sell and convey given to my executors, or such as may qualify, and the survivors or survivor of them. * * * In case any of my said daughters die without leaving issue, then such portion of her share as she shall not have devised or bequeathed, as herein or therein provided, shall pass to her or their brothers and sisters, or to their issue, in case of their death, as in said will provided."

Held (1), that each daughter took an estate for life in her share, without the right to control or reduce the capital except by her will; (2), that the court had power to appoint a trustee for the protection of the daughters and those in remainder.

APPEAL from a judgment entered on the report of a referee.

This action was brought to secure the judicial construction of

the will of James B. Murray, deceased. By the judgment entered in the action, the appellant was declared entitled to a life estate only, and her share was directed to be transferred to the New York Life Insurance and Trust Company, to be held by it as her trustee; and the income thereof paid to her during her natural life.

Joseph H. Choate, for the appellant.

Grosvenor P. Lowery, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed, with costs.

EDWARD VAN RANST, RESPONDENT, v. THE NEW YORK
COLLEGE OF VETERINARY SURGEONS, APPELLANT.

Injunction — laches.

The charter of the defendant (chap. 269 of 1857, as amended by chap. 346 of 1862), authorized the board of trustees to declare vacant the place of any trustee who should refuse or neglect to attend six regular meetings. At a meeting of the board held August 5th, 1863, a resolution was passed declaring the place of the plaintiff vacant, for not attending six regular meetings. He had then been absent from three successive meetings, and from that time until May 13th, 1874, he never attended a meeting or claimed to act as a trustee. This suit was commenced to restrain the defendant from preventing him from acting as such trustee, and from filling his place in the board. *Held*, that he had slept too long on his rights, if he had any, to justify the granting of a temporary injunction.

APPEAL from an order made at the Special Term, continuing a temporary injunction.

John J. Macklin, for the appellant.

Wm. H. Arnoux, for the respondent.

Opinion by DAVIS, P. J.

DANIELS, J., concurred.

BRADY, J., concurred in the result, holding that the plaintiff's remedy was by *quo warranto*.

Order reversed and motion denied, with ten dollars costs of this appeal besides disbursements, and ten dollars costs of opposing the motion below.

JOEL W. MASON, RESPONDENT, v. CHARLES PARTRIDGE,
IMPLEADED, ETC., APPELLANT.

EDWIN SAWYER AND OTHERS, RESPONDENTS, v. THE SAME,
APPELLANT.

LEVY KILBURN AND OTHERS, RESPONDENTS, v. THE SAME,
APPELLANT.

Partnership — limitation upon power of managing partner — waiver of.

An agreement, in writing, was entered into between the defendants Partridge and Whitney, by which the former placed \$2,000 in the hands of the latter to be used in the business of buying and selling chairs and the materials therefor; Whitney having no authority to sign any note or obligation of indebtedness for Partridge, but to conduct the business for cash only; Partridge in no event to be liable for more than the \$2,000 advanced. Whitney was to have one-half of the profits and was to render quarterly statements showing the condition of the business. Whitney subsequently purchased of the plaintiffs in the above actions, who had notice of the conditions of the agreement, large amounts of goods upon credit. By the statements which were regularly furnished as required by the agreement, it appeared that debts had been created, in the course of the business, largely in excess of the \$2,000. *Held*, that Partridge by failing to object to the business being carried on upon credit, held Whitney out as authorized to transact the business in that way, and was liable for the debts so contracted.

APPEALS from judgments in favor of the plaintiffs in the above entitled actions, entered upon the reports of a referee.

William F. Leonard, for the appellant.

Joseph H. Choate, for the respondents.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

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Judgment in the first action modified by reducing the recovery from \$696.10 to \$180.50 and interest, as specified in opinion, if plaintiff so stipulate, and as modified affirmed, without costs.

Judgment in other actions affirmed.

BENNO SPEYER, RESPONDENT, v. JAMES B. COLGATE
AND OTHERS, APPELLANTS.

Broker — duty of — measure of damages.

The defendants, acting as plaintiff's brokers, having purchased for him \$40,000 in gold, he entered into two agreements with one Meyberg, by one of which he sold \$20,000 to be delivered, at his option, between the first and twentieth of February; and by the other he sold \$20,000 to be delivered at Meyberg's option, between the twenty-first of January and the twenty-first of February. The contracts signed by Meyberg were sent by the plaintiff to the defendants, with a letter requesting them to deliver the amounts to the buyer. An agent of Meyberg called on the thirtieth of January and demanded the \$20,000 deliverable at his option, which was accordingly delivered to him. The agent at the time stated that he had the other contract in his possession. The defendants did not tender the \$20,000 sold under the other agreement during the time specified. In an action brought to recover the damages sustained by the loss of the opportunity to sell the gold, *held*, that it was defendants' duty to have made the tender, and that they were liable to the plaintiff for the damages sustained by him from their failure so to do.

The plaintiff was first informed of their failure on the third of April. *Held*, that it was his duty to at once take the necessary steps to secure himself against further loss; and that the defendants were not responsible for any loss sustained by him in consequence of the subsequent fall in the price of gold.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

C. W. Town, for the appellants.

James P. Lowrey, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment modified, and as modified affirmed, with costs.

AMOS S. ROGERS, ASSIGNEE, ETC., APPELLANT, v. GEORGE SCHMERSAHL AND ANOTHER, RESPONDENTS.

Code, § 348 — notice required by.

Where, in an action brought upon an undertaking given in pursuance of section 348 of the Code, a notice had been served by the plaintiff upon the defendant, informing him that judgment was duly entered on the 18th of January, 1866; "that on the 18th July, 1866, the said judgment was duly affirmed on appeal to the General Term of said court, and that the appeal to the Court of Appeals taken herein by the defendant was duly dismissed and judgment duly entered on the remittitur from the Court of Appeals on 21st of June, 1869, affirming the said judgment," with costs of the appeal: *Held*, that the notice was sufficient, although it did not state specifically that the judgment of affirmance by the General Term had ever been entered.

Quare, whether any notice is required to be given in cases where an appeal has been taken to the Court of Appeals.

APPEAL from a judgment in favor of the defendant, entered upon an order dismissing the complaint.

In this action, brought upon an undertaking given in pursuance of section 348 of the Code, the complaint was dismissed on the ground that the requisite notice of entry of judgment had not been given.

R. H. Underhill, for the appellant.

Wm. B. Aitken and *Joseph M. Dixon*, for the respondents.

Opinion by *BRADY, J.*

DAVIS, P. J., and *DANIELS, J.*, concurred.

Judgment reversed and new trial ordered, costs to abide the event.

IN THE MATTER OF THE PETITION OF SOPHIA R. C. FURNISS
AND OTHERS, APPELLANTS, TO VACATE AN ASSESSMENT.

Chapter 338, Laws of 1858; chap. 312, Laws of 1874—when application to vacate assessment cannot be made under.

When an assessment has been made to pay the compensation awarded for land taken to open streets in the city of New York, in pursuance of 2 Revised Laws of 1813, page 409, section 178, as amended by chapter 483, Laws of 1862, an application to vacate it under chapter 338, Laws of 1858, as amended by chapter 312 of 1874, can only be made for fraud or substantial error, in cases where no investigation could be had in the first instance or in the proceeding itself. The statute does not apply to assessments imposed when no fraud is alleged, and when no error is urged other than that the land assessed is not subject to assessment.

In matter of Aaron Arnold (Court of Appeals, Feb. 1875) followed.

APPEAL from an order made at the Special Term, denying an application to vacate an assessment for opening Twelfth avenue from Fifty-ninth to One Hundred and Thirty-third street; and for opening One Hundred and Fourth, One Hundred and Fifth and One Hundred and Sixth streets, from Eighth avenue west to the public drive. The petitioner alleged that the lots were all below high-water mark, and actually covered by water, being in the navigable portion of the Hudson river, and that for this reason they were not subject to assessment.

Daniel Lord, Jr., for the appellants.

E. Delafeld Smith and *William Barnes*, for the respondent.

Opinion by BRADY, J.

DANIELS, J., concurred.

Order affirmed.

EDMUND COFFIN, APPELLANT, v. THE CHICAGO AND
NORTHERN PACIFIC CONSTRUCTION COMPANY,
IMPLEADED, ETC., RESPONDENT.

Order of publication — when granted — Foreign corporation — jurisdiction over.

This court has jurisdiction of an action, in which the plaintiff is a resident of this State and the principal defendant a corporation created and existing under the laws of the State of Wisconsin, brought to procure the sale of certain bonds delivered by the corporation as collateral security for the payment of promissory notes made by it.

By the agreement under which the bonds were transferred as security, the party of the second part was, in case of any default on the part of the corporation, authorized to sell the bonds upon giving certain notice therein specified. *Held*, that this stipulation simply conferred the right to sell and prescribed the mode in which the sale could be summarily made, without either expressly or by reasonable implication excluding other lawful proceedings for the attainment of the same object.

APPEAL from an order vacating an order of publication, and setting aside service of summons and complaint made under it.

Edmund Coffin, Jr., for the appellant.

Henry Day, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Order reversed with ten dollars costs, besides disbursements.

JAMES GOPSILL, RESPONDENT, v. DAVID R. DECKER
AND ANOTHER, APPELLANTS.

Undertaking — approval of sureties not indorsed upon — justification — waiver.

Upon appeal to the Court of Appeals an undertaking was given with two sureties, to whose sufficiency the plaintiff excepted; upon examination one of them was approved, and the other not being considered sufficient, an adjournment was had to give the defendant time to give additional surety. Subsequently it was agreed by the attorneys of the respective parties, that both the

said sureties should be accepted, defendant's attorney promising to have it so marked upon the undertaking by the court; which, however, was never done, although the appeal was taken as though it had been.

In this action brought upon the undertaking against the sureties thereto, they claimed that it could not be maintained for the reason that the approval of the sureties had never been indorsed on the undertaking as required by section 196 of the Code. *Held*, that the objection could not be sustained: 1. Because it would enable the defendants to take advantage of their own wrong. 2. That the consent in writing by the plaintiff's attorney, to accept the surety first objected to, was a waiver of the justification and no indorsement was necessary.

APPEAL from an order made at the Special Term, granting a new trial.

Hatch & Van Allen, for the appellants.

E. A. Doolittle, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed with ten dollars costs, besides disbursements.

WILLIAM B. WAIT, RESPONDENT, v. AUGUSTUS N. WELLER, APPELLANT.

Injunction.

In 1870 the W. and F. R. R. Co. executed a mortgage upon their road for \$125,000 to the Union Trust Company, as trustee. In 1872, desiring to increase their funded debt, another mortgage for \$175,000, described as a first mortgage, was executed to the appellant, the company intending to take up the \$125,000 mortgage. This project failed, as some of the holders of the first bonds refused to surrender them. Subsequently the property of the road was sold under a judgment and a new company organized. An action was then commenced by the appellant, the trustee of the second mortgage, to foreclose it, the new road and the Union Trust Company being made parties to the suit. The plaintiff, the holder of some of the bonds issued under the second mortgage, applied for and obtained an injunction restraining the appellant from proceeding in that action until he procured the surrender of all the bonds issued under the first mortgage. *Held*, that the injunction was improperly granted and should be vacated.

FIRST DEPARTMENT, MAY TERM, 1875.

APPEAL from an order made at the Special Term continuing an injunction restraining the appellant from foreclosing a mortgage until the conditions on which the bonds were issued should be fulfilled.

H. J. Schenck, for the appellant.

Waldo Hutchins, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order reversed with ten dollars costs, besides disbursements, and motion for injunction denied, with ten dollars costs.

WILLIAM E. DEMAREST AND ANOTHER, APPELLANTS, v.
WILLIAM H. WICKHAM, MAYOR OF THE CITY OF NEW
YORK, RESPONDENT.

Chapter 335, Laws of 1873 — assistant aldermen in the city of New York — power of legislature to abolish office — State Constitution, art. 10, § 2.

The power of the legislature over the office of assistant alderman in the city of New York, as it existed prior to the passage of the act of 1873, was unrestricted, except that during its continuance it could only be filled by election or appointment in the mode prescribed by section 2 of article 10 of the Constitution. Accordingly *held*, that chapter 335 of 1873, abolishing this office and transferring its powers and duties to the board of aldermen, was constitutional and valid.

APPEAL from an order sustaining a demurrer to the complaint herein, and from a judgment entered pursuant to the same.

W. S. Wolf, for the appellants.

T. B. Clarkson and *E. Delafield Smith*, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment and order affirmed, with costs.

BENJAMIN P. LAMBERTSON, RESPONDENT, v. GEORGE
W. VAN BOSKERCK AND ANOTHER, APPELLANTS.

Order of arrest—when granted—tort—waiver of—estoppel.

The defendants having been directed to purchase, with money of the plaintiff then in their hands, \$4,000 of United States bonds, wrote to the plaintiff's agents advising them of the purchase and the cost attending it. *Held*, that this letter operated as an estoppel upon the defendants, and prevented them from thereafter denying that they had purchased the bonds as therein stated.

After the alleged conversion of the bonds, defendants paid a part of the claim made for their value. *Held*, that the receipt of this money did not waive the tort or absolve the wrong-doer from the consequences of his wrongful act (*Murray v. Burling*, 10 Johns., 172; *Sedg. on Dam.*, 492; *Reynolds v. Shuler*, 5 Cow., 323; *Hibbard v. Stewart*, 1 Hilt., 207; *Burns v. Morris*, 4 Tyrw., 485; 2 Greenl. on Ev., 639; *Robbins v. Seithel*, 20 How., 366; *Person v. Civer*, 29 id., 432), but merely operated in mitigation of the damages to be given.

APPEAL from an order made at the Special Term, denying a motion to vacate an order of arrest.

Theo. F. Miller, for the appellants.

Seargent P. Stearns, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed with ten dollars costs besides disbursements.

FRANCIS VOSE, RESPONDENT, v. DAVID L. YULEE,
APPELLANT.

Removal of cause to United States court—order of court or acceptance of sureties essential—Collateral security—improper disposition of—burden of proof.

The mere filing of the papers on an application for the removal of a cause to the United States court, does not have the effect of removing the action. The court must act upon them either by order or by accepting the sureties offered. (*Bell v. Dix*, 49 N. Y., 233; *Cooke v. State Nat. Bank*, 52 id., 96; *Suydam v. Smith*, 1 Denio, 263; *Fairchild v. Durand*, 8 Abb. Pr., 305; *Bristol v. Chapman*,

34 How., 140; *Gordon v. Longest*, 16 Peters, 97; *Kanouse v. Martin*, 15 How. [U. S.], 198; *Ins. Co. v. Dunn*, 19 Wall., 222.)

Where an indorser of a note is sued upon it, if the plaintiff has received any collateral security for its payment, the burden of proof is on the party sued to show that such collateral security has been improperly disposed of.

THIS action was originally commenced against the defendant Yulee, jointly with the Florida Railroad Company, Edward N. Dickerson, Marshall O. Roberts and Isaac H. Roberts, who were joined as co-defendants, and was founded upon an indebtedness of the Florida Railroad Company to the plaintiff upon certain notes made by the company, upon a part of which David L. Yulee was indorser. It was originally tried in 1869 at Special Term, without a jury. That court dismissed the complaint as to all the defendants. The General Term affirmed the action of the Special Term, but on the plaintiff's appeal to the Court of Appeals, that court, affirming the judgment as to all the defendants but Yulee, reversed it and ordered a new trial as to him alone. (50 N. Y., 369.)

After the decision of the Court of Appeals the defendant Yulee filed a petition for the removal of the case into the United States Circuit Court, under the act of July 27th, 1866. (14 Stat., 306.) The motion was denied. When the case was called for trial at Special Term, he again moved that that court proceed no further, basing his motion on the same ground. This was also denied.

The plaintiff rested upon the pleadings and proof of the amount due on the notes.

The court ordered a verdict for the plaintiff for the amount admitted to be due on the notes indorsed by the defendant. The General Term was of opinion that the defendant offered no evidence sufficient to show an improper disposition of certain securities held as collateral to the notes.

E. N. Dickerson, for the appellant.

T. G. Strong, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed, with costs.

HORACE H. BAXTER, RESPONDENT, v. THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Code, § 236 — right of attaching creditor to examination of defendant's debtor under.

An order requiring a debtor of the defendant to appear and be examined, made on account of his refusal to give the certificate required by section 236 of the Code for the benefit of an attaching creditor, will not be vacated on an affidavit of such debtor stating that the funds in his hands are held in trust and cannot be applied in payment of the plaintiff's debt. The attaching creditor is not bound to take the statement of the debtor as to the character in which the money is held by him, but is entitled to the examination provided for by the Code.

APPEAL by L. H. Meyer from an order made at the Special Term, directing him to appear and be examined concerning property alleged to be held by him for the benefit of the defendant.

John E. Burrill, for the appellant.

Coles Morris, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs besides disbursements.

THE CHRISTOPHER AND TENTH STREET RAILROAD COMPANY, RESPONDENT, v. THE CENTRAL CROSS-TOWN RAILROAD COMPANY OF NEW YORK, APPELLANT.

Chapters 160 and 301 of 1873 — injunction — who may apply for.

Chapter 160, Laws of 1873, confers upon the corporation thereby created the right to extend its tracks to the North river at the foot of Christopher street. Chapter 301, Laws of 1873, did not confer upon the plaintiff any exclusive rights, nor did it confer upon it the power or duty of interfering to protect the public interest either in behalf of the city or of the general public. If the defendant had no right to run its tracks to the foot of Christopher street, the public alone could interfere to restrain it by injunction, unless the defendant had actually interfered with the tracks of the plaintiff at that point, or was about to do so.

FIRST DEPARTMENT, MAY TERM, 1875.

APPEAL from an order made at the Special Term, making absolute a temporary injunction granted in this action.

Simon Sterne, for the appellant.

John M. Scribner, Jr., for the respondent.

Opinions by DAVIS, P. J., and BRADY, J.

DANIELS, J., concurred with DAVIS, P. J.

Order reversed with ten dollars costs, besides disbursements; and motion below denied with ten dollars costs.

JOHN WHITE AND OTHERS, APPELLANTS, v. JACKSON C. FULLER, RESPONDENT.

Agency — Custom — who bound by.

This action was brought to recover damages for the breach of a contract for the purchase of coal, alleged to have been made with an agent of the defendant, the coal to be delivered at various times covering a period of four months. The defense was that the party making the contract was not the agent of the defendant. Upon the trial evidence was given to show that by a custom existing in reference to agencies for coal, the agent had not, unless specially authorized, the right to make a time contract such as the one in question. *Held*, that as the plaintiff would be presumed to have dealt with reference to the custom (*Easton v. Clark*, 35 N. Y., 232; Story on Agency, §§ 224, 225), it was incumbent upon him to have ascertained whether the agent had the special power to make the sale in question, and that as he had failed to do so, the defendant was not liable upon the contract, the agent not being in fact authorized to make it.

APPEAL from a judgment in favor of the defendant, entered upon the verdict of a jury.

William W. Goodrich, for the appellants.

Aaron J. Vanderpoel and *Joseph A. Welch*, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

EUGENE KELLY, RESPONDENT, v. THE MARIPOSA LAND
AND MINING COMPANY AND OTHERS, APPELLANTS.

Corporation — when enjoined from transferring its property.

The plaintiff owned, and held as security, a large quantity of the stock of the Mariposa Land and Mining Company, a corporation organized under the laws of this State, to which a large tract of land had been conveyed, constituting the bulk of its property. A new company was afterward organized in California, to which it was proposed to convey all the property of the former corporation. The plaintiff, claiming that such transfer was made with the intent to render his stock worthless, and to deprive him of all control of the company, brought this action to restrain the defendant from carrying such transfer into effect, and to secure the appointment of a receiver. *Held*, that a temporary injunction was properly granted and a receiver appointed.

APPEAL from an order continuing an injunction and appointing a receiver.

C. Bainbridge Smith, for the appellants.

Aug. F. Smith, for the respondent.

Opinion by DANIELS, J.

BRADY, J., concurred.

Order modified, and as modified affirmed, with costs to abide the event of the action.

JAMES B. RYER, RESPONDENT, v. THOMAS WIBERLEY,
APPELLANT.

Agreement for commissions — construction of.

This action was brought to recover commissions claimed to be due under a written agreement by which the defendant promised to pay to the plaintiff ten per cent on all sales made to customers that he solicited, or that might be made through his influence. *Held*, that by a fair interpretation of the agreement, whenever the solicitation was of, or the influence was exercised upon, a person who had already dealt with the defendant, the commission should be confined to the transaction accomplished, thus requiring separate sales by the plaintiff

to entitle him to a continuing benefit under the agreement, unless from the length of time during which the customer had ceased to deal with the defendant, it would be a fair inference that he had discontinued his patronage; while, if the customer were made such by the intervention of the plaintiff's solicitation or influence, the commissions should be payable on all sales to him as long as the agreement continued unbroken.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

F. G. Salmon and *James R. Angel*, for the appellant.

Peabody & Baker, for the respondent.

Opinion by BRADY, J.

DANIELS, J., concurred.

Judgment modified, and as modified affirmed, without costs to either party.

THE GERMANIA BANK OF THE CITY OF NEW YORK,
RESPONDENT, v. GEORGE DISTLER, IMPEADED, ETC., APPELLANT.

Date of instrument only presumptive evidence of time of its execution — mistake in — may be shown by parol evidence, by indorsee as well as payee.

The date of an instrument in writing is only presumptive evidence of the time of its actual execution, and such presumption, whenever fraud or mistake is alleged, may be contradicted by parol evidence. (*Drake v. Rogers*, 32 Maine, 524; 1 Parsons on Bills and Notes, 41; *Draper v. Snow*, 20 N. Y., 331; *Breck v. Cole*, 4 Sandf., 80.)

Such mistake may be shown as well by the indorsee as by the payee of a promissory note.

APPEAL from a judgment in favor of the plaintiff, entered on the verdict of a jury.

This action was upon a promissory note, made by the defendant, payable to the order of Altenbrandt Brothers, and by them indorsed to the plaintiff. It was dated on the 18th of December, 1872, and was due in three months after its date. The complaint alleged that

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the note was dated in 1872 by mistake, and that it was designed to have been dated in 1871. The answer denied these allegations, and the parties went to trial on this and another issue in the cause not considered on the appeal. It was objected by the defendant that the alleged mistake could not be shown by the plaintiff, or under the pleadings.

Dailey & Perry, for the appellant.

Geo. W. Carpenter, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and DONOHUE, J., concurred.

Judgment affirmed.

THE UNITED STATES, APPELLANT AND RESPONDENT, v.
LAFAYETTE GRAFF, APPELLANT AND RESPONDENT.

Jurisdiction of State court of action by United States to recover unpaid duties—Attachment—when may issue in action on contract for recovery of unliquidated damages—tangible property—how attached—Safe in Trust Company's vault—when may be opened by sheriff.

Where an action is brought in a State court by the United States for the recovery of duties unpaid on imported goods, the primary object of the action being not simply to execute the laws of the United States but to collect a debt by enforcing an obligation due to it, the court has jurisdiction of the cause of action.

Whether a State court can entertain an action brought simply to enforce the laws of the United States not decided.

The principle of implied contracts is applicable to the payment of duties under the United States internal revenue statutes. (*Meredith v. United States*, 13 Peters, 486.)

Attachments may issue in actions on contracts for the recovery of unliquidated damages, when a proper disclosure of the grounds of the claim supplies practicable means for determining its amount. (*Lawton v. Reil*, 34 How. Pr., 465; *Clews v. Rockford R. R. Co.*, 2 Hun, 379.)

Personal property, tangible in its character, can only be attached by the sheriff's taking it into his custody. (Wait's Code, 407, § 232, and note; *Haggerty v. Wilber*, 16 Johns., 287; *Goll v. Hinton*, 8 Abb., 120; *Smith v. Orser*, 42 N. Y., 182.)

A safe in a trust company's vault is not within the protection which the law affords to a person's dwelling-house against the execution of civil process.

APPEALS from an order made at Special Term, denying a motion to vacate an attachment, and directing the sheriff to open a safe of the Mercantile Trust Company, and remove therefrom certain securities.

The defendant appeals from so much of the order made by the Special Term at chambers, as denied his motion to vacate an attachment issued against his property in this action, and directed the sheriff to open a safe of the Mercantile Trust Company and a tin box, in which it was claimed he had property and securities on deposit. The Mercantile Trust Company appeals from so much of such order as directs the sheriff to open the safe and tin box, and take from them and safely keep the property and evidences of debt liable to attachment found therein; and the plaintiff appeals from the part of the order directing the exclusion of counsel and agents of each party, at the time of opening such safe by the sheriff.

Edmund H. Smith, for the plaintiff.

S. G. Clarke, for the defendant.

Alexander & Green, for the Trust Company.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, without costs.

IN THE MATTER OF THE PETITION OF THE NEW YORK BRIDGE
COMPANY, TO ACQUIRE REAL ESTATE.

Section 15 of chap. 140, Laws of 1850 — Upon whom burden of proof rests in applications under — chap. 601, Laws of 1874.

Where an application is made to take real estate under the general railroad act (chap. 140, Laws 1850) the burden of proving, by legal evidence, that the facts alleged in the petition are not true, is, by section 15 of the said act, cast upon the owner of the land, and an affidavit or answer is not sufficient for that purpose.

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Buffalo and State Line R. R. Co. v. Reynolds (6 How., 96) followed.

Section 26 of said act, providing that when the title is vested in any trustee not authorized to sell, or in any infant, idiot or person of unsound mind, the Supreme Court shall have authority to direct the sale of the land, is for the benefit of the trustee and infant or idiot owner, and is not compulsory upon the railroad company.

By chapter 601 of the Laws of 1874, the forfeiture of the charter of the New York Bridge Company, occasioned by its failure to complete the bridge within the time limited by law, was unconditionally waived.

People v. The President, etc., of the Manhattan Co. (9 Wend., 380, 381) followed.

APPEAL from an order appointing commissioners to determine the compensation to be made by the New York Bridge Company for certain lands proposed to be taken by it.

Wm. F. Shepard, for the appellant.

Edgar McCullen, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed.

THE PEOPLE EX REL. EMMA LEE AND OTHERS v. BUTLER
H. BIXBY AND OTHERS, CONSTITUTING A COURT OF SPECIAL
SESSIONS, RESPONDENTS.

Indecent exposure — “Public place” — Joint conviction.

Where six women made an indecent exposure of their persons for hire, in the presence of five men, in a room in the rear of the second story of a house of prostitution, the doors, windows and shutters being closed, *held*, that the room where it occurred was a “public place,” and that the women were properly convicted of the crime of indecent exposure.

The offense being a misdemeanor committed by all the relators at the same time, each aiding and abetting every other, *held*, that they might be jointly prosecuted and convicted. (*Rex v. Orchard*, 3 Cox, 248; *Rex v. Harris*, 11 id., 659.)

CERTIORARI to review the conviction of the relators of the crime of indecent exposure.

William F. Howe, for the relators.

B. K. Phelps, district attorney, for the respondents.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Proceedings affirmed and writ dismissed.

ANDREW SMITH, APPELLANT, v. THE MAYOR, ETC., OF
THE CITY OF NEW YORK, RESPONDENT.

Overflow from sewer — when city not liable for.

This action was brought to recover damages sustained by the plaintiff in consequence of water setting back into his basement from a sewer constructed and maintained by the defendant. The overflow occurred on the 4th of July, 1872, and was preceded by a heavy rain, which conveyed so much sand into the sewer as to completely obstruct and prevent the water from passing through it. The evidence did not show it to have been in any manner obstructed before, nor was it improperly constructed or out of repair. Before the sand was washed into it, and after its removal, it appeared to be sufficient to carry off the water flowing into it. *Held*, that the defendant was not liable.

Nims v. Mayor, etc., of Troy (3 N. Y. S. C., 5) and *McCarthy v. Syracuse* (46 N. Y., 194) distinguished.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

Henry Parsons, for the appellant.

E. Delafield Smith, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

JOSEPH P. MANTON, RESPONDENT, v. J. MORTON POOLE,
AND OTHERS, APPELLANTS.

Attachment—affidavit for, must state a cause of action—mere recital of facts insufficient.

The affidavit on which an attachment is granted must show that a cause of action exists in favor of plaintiff.

It must state the facts out of which the cause of action arose.

A mere recital of facts without a direct statement of their existence is insufficient.

APPEAL from an order denying a motion to set aside an attachment.

The affidavit set forth, that the defendants were indebted to the plaintiff in the sum of \$20,000 damages, and that the grounds of the plaintiff's claim were as follows, to wit: "The breach and violation by the said defendants of the covenants, agreements and conditions, on their part to be kept and performed, contained in a certain agreement and patent license, duly made on or about the 26th day of August, 1872, in writing, under seal, of that date duly executed by and between deponent, this plaintiff, as party of the first part thereto, and said defendants as parties of the second part thereto, and particularly the breach and violation by the said defendants of their covenant and agreement therein contained, to use all proper and reasonable efforts, by the employment of agents and canvassers, and by advertising, to make sales of the boilers in the territory, in and as in said agreement and license specified and provided, and to make the patent therein specified remunerative to this plaintiff, said party of the first part thereto, to the damage of the said plaintiff to said sum of \$20,000." This was all that was stated for the purpose of showing the grounds of the claim, or the existence of a cause of action.

James C. Carter, for the appellants.

John S. Washburn, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Order reversed with ten dollars costs, besides disbursements, and motion granted, with ten dollars costs.

DAVID W. SWEET, RESPONDENT, v. JAMES L. TITUS AND
ANDREW R. TITUS, APPELLANTS.

Payment—when delivery of check is not—creditor not bound to receive either check or money.

The delivery of a check is not a payment, unless there be an agreement to that effect, or unless the drawer, in consequence of some laches on the part of the holder, has sustained loss or injury in respect thereof, and then only *pro tanto*. (*The Syracuse, Binghamton and N. Y. R. R. Co. v. Collins*, 3 Lansing, 29 and cases cited; *Hill v. Beebe*, 13 N. Y., 566; *Bradford v. Fox*, 38 id., 239.) The creditor is not bound to accept a check, even if it be for the entire amount of his claim. He is not bound to receive money. He may, although it be sent to him, refuse to accept it and leave the debtor to his plea of tender when sued for the claim. He may do this even though, having received the money, he keeps it subject to the order of the debtor. The latter must withdraw the money and plead a tender, and thus save himself from the costs of the controversy. (*The Kingston Bank v. Gay*, 19 Barb., 460.)

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

J. H. & W. L. Van Derzee, for the appellants.

E. E. Harding, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

**MARGARET E. DEFOREST v. TERENCE FARLEY AND
OTHERS.**

2 R. S., 193, § 165 — *sale of mortgaged premises.*

Upon the foreclosure of a mortgage covering several houses, the court has power to direct a sale of all the property therein described, though the amount due upon the mortgage may be raised by a sale of a portion thereof.

Livingston v. Muldrum (19 N. Y., 440, 443) followed.

APPEAL by Thomas D. Stetson, a purchaser at a sale on the foreclosure of a mortgage, from an order of the Special Term denying a motion to relieve him from such purchase.

M. S. Thompson, for the appellant.

Walter Edwards, Jr., for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order affirmed.

**ANNA K. GILMAN, EXECUTRIX, ETC., APPELLANT, v. CAROLINE
G. REDINGTON AND OTHERS, RESPONDENTS.**

Appeal from order of surrogate — costs allowed on — Code, section 318.

Upon appeal to the General Term from an order of the surrogate, the costs which may be allowed under section 318 of the Code, are only those which may be recovered in an action at issue on a question of law from the time the proceeding is brought into the Supreme Court, viz., twenty dollars for the argument and ten dollars for each term the appeal is necessarily on the calendar, and the disbursements.

Morgan v. Morgan (1 Abb. [N. S.], 40) approved.

APPEAL from an order made at the Special Term readjusting a bill of costs.

Wellesley W. Gage, for the appellant.

Charles E. Whitehead, for the respondents.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order modified, and as modified affirmed, without costs to either party.

PEOPLE EX REL. CHARLES LEWIS AND OTHERS v. J. F. DALY AND OTHERS, JUDGES OF THE COURT OF COMMON PLEAS, AND ISAAC GOLDSTEIN.

Discharge of imprisoned debtor — publication of notice necessary to give court jurisdiction — Certiorari.

ISAAC GOLDSTEIN, an insolvent and imprisoned debtor, applied to the respondent for a discharge of his person from imprisonment. On the day the order to show cause was returnable, there being no opposition, the order was granted. The proceedings were removed into this court, in pursuance of section 47 (2 R. S. [Edm. ed.] 50). The relators sought a reversal, on the grounds that the notice directed by section 4 (2 R. S. [Edm. ed.], 29), was, by the order of the judge, to be published in the Daily Register and Albany Evening Journal, and was directed to be given for the 6th of June, 1874, at 11 A. M.; that, in fact, the publication of the notice in the Register was of an application to be made on the 3d of June, 1874, at 11 A. M., and so the proof before the officer disclosed the fact to be. The General Term *held*, that until the publication of the notice was made as directed, and proof of such publication was before the officer, he was without jurisdiction. (16 Barb., 319.)

It was claimed on the part of the respondent, that the relator having the right of appeal in the Common Pleas, the remedy by *certiorari* should be denied him; but the General Term *held*, that the statute (2 R. S. [Edm. ed.], 50, § 47) was positive as to

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the relator's right, and the court had no right to withhold what the statute gave to a party.

James R. Adams, for the relators.

H. Morrison, for the respondents.

Opinion by DONOHUE, J.

DAVIS, P. J., and DANIELS, J., concurred.

Proceedings reversed, with costs.

KATE KENNEDY, RESPONDENT, v. GEORGE BARANDON
AND JOHN BARANDON, APPELLANTS.

Creditor's bill to reach real estate fraudulently conveyed — sale by sheriff instead of receiver — when proper.

APPEAL from a judgment of the Special Term, in an action in the nature of a creditor's bill to reach the real estate of the defendant George Barandon, alleged to have been mortgaged and conveyed to the defendant John Barandon, with intent to hinder, delay and defraud the creditors of the former. The court found that the mortgage and conveyance were fraudulent, and gave judgment declaring the same fraudulent and void as against plaintiff and other creditors, and setting the issue aside, and directing that the real estate be sold on execution by the sheriff, and that the judgment of plaintiff and the costs of this action be paid out of the proceeds of the sale, and the surplus be brought into court. The question in the case was purely one of fact.

The court at General Term held, that it was the usual, and, it thought, the better practice, in this class of cases, to direct the appointment of a receiver, and a sale by him, but that it was not improper to adjudge that the sale be made on execution by the sheriff. (2 Van Sant. Eq. Pr., 158; *Orr v. Gilmore*, 7 Lans., 345; 5 Wait's Pr., 655.) As it did not appear that there were any other

creditors, the judgment should have only declared the mortgage and conveyance fraudulent and void as to plaintiff's judgment, and directed the sale for the payment of that alone, with the costs.

The provision of the judgment directing that the surplus on the sale be brought into court, was not appropriate to the case made by the pleadings and proofs. (*Wilder v. Keeler*, 3 Paige, 164; *Kerr v. Blodgett*, 48 N. Y., 62; *Wait's Pr.*, 653-654.) The judgment was modified by striking out that direction, and, as so modified, affirmed, with costs.

Edward Van Ness, for the appellants.

C. C. Bigelow, for the respondent.

Opinions by DAVIS, P. J., and BRADY, J.

DANIELS, J., concurred.

Judgment, as modified, affirmed.

SAMUEL P. DINSMORE AND OTHERS, RESPONDENTS, v. THE
MAYOR, ETC., OF THE CITY OF NEW YORK, APPELLANT.

Answer — when not frivolous.

APPEAL from an order striking out the defendant's answer as frivolous.

The plaintiffs alleged that they performed work, labor and services for and at the request of the defendant, its agents and servants, in printing and advertising for it in a newspaper called "The Stockholder." The defendant, by the first paragraph of its answer, denied that it requested or employed the plaintiffs to print or publish the notices and advertisements named in the complaint and specified in the bill of particulars. In addition to this denial other matters were set up as a further and separate defense. The General Term held, that the denial recited struck at the very foundation of the plaintiffs' case, and could not be stricken out as frivolous.

E. Delafield Smith, for the appellant.

S. P. Dinsmore, for the respondents.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order reversed with ten dollars costs, besides disbursements.

TERENCE P. SMITH, RESPONDENT, v. THE MAYOR, ETC.,
OF THE CITY OF NEW YORK, APPELLANT.

1869, chap. 876, § 11 — “public officer.”

APPEAL from an order overruling a demurrer to the complaint.

Respondent was appointed messenger to the president of the board of aldermen, on the 1st day of January, 1869, and performed the duties of said messenger until the 6th day of June, 1870.

On the 23d day of October, 1869, his salary was increased from \$1,500 to \$2,500 per annum. Appellant refused to pay the difference between the original salary and the increased salary, and this action is brought to recover such increase.

Appellant demurred to the complaint, and the demurrer was overruled, and judgment ordered for plaintiff.

The position taken by appellant was that the increase was in violation of section 11, chapter 876 of the Laws of 1869, passed May 12, 1869, which provides as follows: “The common council of the city of New York are hereby prohibited from creating any new office or department, or increasing the salaries of those now in office, or their successors, except as provided by acts passed by the legislature.” The court at General Term *held*, that a messenger to the president of the board of aldermen in New York, was not a public officer within the meaning of section 11 of chapter 876 of 1869.

Collins v. The Mayor, etc. (10 S. C., 680), in which case it was held that the plaintiff was an officer, was distinguished because the office of his principal was one created by law, and its duties were official, and his deputy or assistant clerk was appointed to perform some portion of the official functions of the clerk himself. But a "messenger to the president of the board of aldermen" could not be supposed to perform the official functions of the president. He serves him in no official capacity in carrying messages and running errands, and is clothed with no power to perform any official duty of that office.

D. J. Dean, for the appellant.

C. E. Miller, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Order affirmed with costs, and with leave to defendants to answer on payment of costs.

SAMUEL PHILIPS, APPELLANT, v. ELIZA WALKER AND
OTHERS.

Foreclosure—referee's fees on sale in.

APPEAL from an order fixing the fees of the referee on a sale of mortgaged premises in the above entitled action. The property at the sale was bid off by plaintiff at \$3,000. The referee retained, out of the ten per cent paid on the sum bid at the sale, the sum of \$129.65 for his fees and charges, over and above disbursements.

The court, referring to chapter 192 of the Laws of 1874, amending chapter 569 of the Laws of 1869, say a very singular question of constitutionality might be raised upon the act of 1874; but it is not necessary to pass upon it, because the appellant's counsel says, in his points, he will be "quite content to have the fees of the referee taxed under this statute," under which he was entitled to thirty dollars as the aggregate of the several items given by the act, besides his disbursements.

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A. C. Thomas, for the appellant.

E. J. Shandley, referee, in person.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Order reversed, and an order entered fixing the referee's fees at thirty dollars and his disbursements, without costs.

DANIEL B. BUSH AND OTHERS, APPELLANTS, v. HENRY R. TREADWELL, RESPONDENT.

APPEAL from a judgment of the Special Term, in favor of the defendant.

The plaintiffs are collateral heirs of Chauncey Bush, who died intestate, October 27, 1865, leaving no widow or child him surviving.

They bring this action, claiming to redeem certain lands described in the complaint, on the ground that a conveyance of the premises by quitclaim deed, executed by said Chauncey Bush to the defendant, on or about the 11th day of August, 1856, was in fact intended as a mortgage; and they allege that the conveyance was executed under an agreement by and between the intestate and the defendant, that the intestate should convey the lands to the defendant, and that the same should be held by the latter as security for the repayment by said Chauncey, of such moneys as he, the said Treadwell, should advance on account of said lands upon said mortgage, assessments and taxes, and that he, the said defendant, would, upon being repaid the same, reconvey the said premises to him, the said Chauncey Bush, or to his heirs or assigns.

The principal question of the case was one purely of fact, and the General Term was of opinion, that the learned justice before whom it was tried, having heard all the evidence on both sides, and decided that upon all the evidence in the case he was unable

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to find that the conveyance was made or intended by said Chauncey Bush, or accepted by said defendant, as a trust as alleged in the complaint, the judgment below should not be disturbed.

James Emott, for the appellants.

B. K. Phelps, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

THE PEOPLE EX REL. DENNIS HOGAN, AND DENNIS
HOGAN, PLAINTIFFS, v. CORNELIUS FLYNN, DEFENDANT.

1872, chap. 438—*clerks and assistant clerks of District Courts—how appointed—
tenure of office of.*

EXCEPTIONS ordered to be heard in the first instance at the General Term. A verdict in this case was directed for plaintiff, and the entry of judgment thereon suspended.

The act of 1872 (chap. 438), by section 1, provides that there shall be a clerk and an assistant clerk in each of the District Courts of the city of New York, who shall be appointed by the justices of said courts, and that they shall hold office and perform the same duties and possess the same powers as now prescribed by law.

It also provides that they shall receive the same salary, and that it shall be paid by the comptroller.

The General Term *held*, that, under the statute, the clerk and assistant were to be appointed by each justice of each of the courts, and that the legislature did not intend to confer upon a number of justices combined, the right to interfere with or control in any way the selection of the officers of the court in which each presided—officers strictly local and whose duties were limited to the court for which they were appointed (1 Edm., 71; 3 R. S. [5th ed.], 1106; Sedg. on Stat., 219, and cases cited); and that such office was held during the pleasure of the authority making the appointment.

(1 R. S. [Edm. ed.], 107.) As to the tenure of the office of clerk, the decision of the General Term in *The People ex rel. Dolan v. Lane* was overruled. (This case on appeal is reported in 55 N. Y., 219.)

Roscoe H. Channing, for the plaintiffs.

Wheeler H. Peckham, for the defendant.

Opinion by BRADY, J.

DAVIS, P. J., dissented.

DANIELS, J., concurred.

Motion for new trial granted, costs to abide event.

THE EXCELSIOR PETROLEUM COMPANY v. AUGUSTUS EMBURY AND OTHERS.

Manufacturing corporations — trustees of.

APPEAL from a judgment entered on the report of a referee.

The defendants in this action were charged with a violation of the provisions of the second section of the eighteenth chapter (title 4) of the first part of the Revised Statutes (vol. 1 [4th ed.], 1175), in having paid dividends, not from the surplus profits of the plaintiff, but by withdrawing and dividing a part of the capital stock without the consent of the legislature.

They were the trustees of a manufacturing corporation, organized under the act of 1848 and the acts amendatory thereof. The General Term was of opinion that, by the thirteenth section of the act of 1848, the legislature substantially designed to provide for the cases in which individual liability should result from the acts prohibited. (*Rochester v. Barnes*, 26 Barb., 657.) That the two statutes were repugnant to each other, and that it was not the meaning or object of the law makers to apply both of these statutes to trustees of a

corporation created under the law of 1848. (Sedgw. on Stat. and Const. Law, 124; *Rochester v. Barnes*, *supra*, and cases cited; *Dash v. Van Kleeck*, 7 Johns., 477; *Columbian Manufacturing Co. v. Vanderpoel*, 4 Cow., 556; *Livingston v. Harris*, 11 Wend., 329; *Harrington v. Trustees of Rochester*, 10 id., 547.)

W. H. Dickinson, for the plaintiff.

John E. Parsons, for Lacey's executors.

Benj. T. Kissam, for the defendant Embury.

Geo. C. Blanke, for defendants Fancher and James McChesney.

G. P. Androus, for defendants Dayton and Patchen.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

JOHN HADEN AND ANOTHER, RESPONDENTS, v. CHARLES
A. BUDDENSICK AND OTHERS, APPELLANTS.

Mortgage — consideration.

APPEAL from a judgment for plaintiff, entered on a referee's report.

The object of this action was the foreclosure of a mortgage executed by the defendants Charles A. Buddensick and wife, to Gustav A. Sturtzkober, to secure the payment of \$8,000 and interest, and assigned by him to the plaintiffs and Samuel Wilson, the latter of whom afterward assigned his interest to the plaintiffs. Before the execution of the mortgage, the mortgagee, Sturtzkober, had entered into contracts with the defendant Charles A. Buddensick, for supply-

ing materials and the performance of labor, in erecting and finishing certain buildings on premises situate in the city of New York. The plaintiffs and Wilson, then their partner, had furnished and supplied to Sturtzkober, the contractor, sashes, blinds and doors, for such buildings, at his request, for which he had become indebted to them in the sum of \$8,000, and they had filed a lien for the debt on the buildings and the land they stood upon. By the terms of the contracts, nothing appears to have been due to the contractor when the mortgage was given. And whether anything more would afterward become due to him under their terms, depended upon the completion of the work; upon that being done, a much larger amount than that mentioned in the mortgage would become due from the mortgagor to the mortgagee. The former, for some reason, desired to remove the lien from his property, which had been placed upon it by the plaintiffs and Wilson, and for that purpose agreed to give the mortgage, and the bond secured by it, to the contractor, with the understanding that it should be assigned to them upon their discharging their lien. In conformity to that agreement, the bond and mortgage were executed, delivered and assigned, and the plaintiffs and Wilson discharged and satisfied their lien. The defendants Buddensick and wife claimed, upon the trial, and insisted upon the argument of the appeal, that, as long as nothing was actually payable by the terms of the contracts when the bond and mortgage were given, they were without consideration, and could not be enforced, for the reason that the contractor had since failed to complete his work.

The General Term *held*, that, to create a consideration sufficient to support an obligation for the security or payment of money, nothing further was required by either law or equity, than benefit to the party obligated, or harm to the person designed to receive it. (1 Parsons on Cont. [2d ed.], 357; *Freeman v. Freeman*, 43 N. Y., 34, 39.) That it undoubtedly was beneficial to Buddensick, the mortgagor and owner of the property, to have the lien appearing against it discharged. And, after receiving the stipulated benefit, and giving the bond and mortgage for it, he could not be exonerated from the obligation to pay what he expressly covenanted for as its price. That if the contractor failed to perform his agreements, the remedy against him was confined to an equivalent by way

of damages, not by resisting the enforcement of the security not rendered dependent on his future fulfillment.

Benjamin M. Stillwell, for the appellants.

Osborn E. Bright, for the respondents.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

JEREMIAH S. DEVLIN AND ANOTHER, RESPONDENTS, v. JOHN S. DEVLIN, APPELLANT.

Injunction — restraining use of name.

APPEAL from an order of Special Term, adjudging defendant in contempt for violating the injunction of the court.

The defendant had been enjoined from making use of the firm name of the plaintiffs, to attract custom to his shop by deception. The injunction restrained the defendant from using the firm name "Devlin & Co.," in any form or manner; and it further ordered "that the said John S. Devlin be, and he is hereby confined — whenever the word Devlin appears or is used in his advertisements, signs, placards, slips or other means and modes of making known his business or place of business, or offering for sale or selling his goods, wares or merchandise — to his own proper christian, middle and surname conjoined, and without monograms, signs or other devices, which may tend to mislead or induce the public or any other person as aforesaid; and it is further ordered that the said John S. Devlin be and he hereby is confined to the use of his own name, John S. Devlin or J. S. Devlin, without the use of a monogram containing the initials J. S. or other device as aforesaid; but nothing herein is to be construed or interpreted as preventing the said defendant from using his own name in his

advertisements, signs or placards." It was not claimed that the firm name "Devlin & Co." had been used ; but that a sign which contained the name J. S. Devlin, had been so arranged that it tended to mislead and deceive the public, in a manner forbidden by the injunction. The justice below came to the conclusion that that was the intent of the arrangement of the figures, letters and words of the sign.

The General Term was of the same opinion, and affirmed the order appealed from, with ten dollars costs besides disbursements.

Walter Edwards, Jr., for the appellant.

John E. Devlin, for the respondents.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with ten dollars costs besides disbursements.

CHARLES H. SMITH, RESPONDENT, v. GEORGE S. WRIGHT,
APPELLANT, AND OTHERS.

APPEAL from a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover a balance due upon a written contract to do joiner and other work on the steamship *Vixen*. By the terms of the contract and specifications, all the materials and workmanship were subject to the approval of the defendant Lewis. The payments were to be made on the order of Lewis. The plaintiff neither gave evidence of an order from the defendant Lewis, nor John T. Wright, Jr., the agent of the defendants, the owners, and who made the contract as such, nor of an application for it, as required by the contract to enable him to demand payment. *Held*, that it was necessary to show, in the absence of the order, that it was obstinately and unreasonably or fraudulently refused on

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application. Performance of the contract when the order is refused will excuse its non-production, because that proof will demonstrate the unreasonable conduct of the person in refusing to give it, but it will not obviate the necessity of applying for it. (*Smith v. Brady*, 17 N. Y., 176; *U. S. v. Robeson*, 9 Peters, 319; *McMahon v. N. Y. and E. R. Co.*, 20 N. Y., 466; *Thomas v. Fleury*, 26 id., 26; see, also, *Hurst v. Litchfield*, 39 id., 380; *Wyckoff v. Meyers*, 44 id., 143; *Glacius v. Black*, 50 id., 145.)

Albert Smith, for the respondent.

John N. Whiting and *Foster & Thomson*, for the appellant.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed and a new trial ordered, with costs to abide event.

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AMANDA O. VAIL AND OTHERS, SURVIVING EXECUTORS, ETC.,
APPELLANTS, v. JOHN W. LANE, RESPONDENT.

Service of answer — when irregular.

APPEAL from order of Special Term, setting aside a judgment.

The attorneys for the appellants and all other persons connected with their office, had left the office at five and a half o'clock, P. M., and the office was closed and locked for the night. Between that time and six o'clock, the clerk of defendant's attorney came to make service of the answer in this action; but, finding the office closed and locked, he procured the janitor of the building to unlock the door, and then left the answer on the table of the managing clerk. The janitor had no authority to open the office for that purpose, and the court held that his act in doing so was that of the clerk who procured him, and the entry of the clerk, under the circumstances, was irregular and unlawful.

The General Term concluded that the order vacating the judgment was granted as a favor, in the discretion of the court; and

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that the respondent was not charged with costs, as is usual in granting such favors, because the court discovered some slight *acidity of practice* in the proceedings of plaintiff's attorneys. That this was a legitimate stimulant to the exercise of judicial discretion, and this court was not to be called upon to interfere with its exercise.

As by the order below, vitality had not been given to the irregular service of the answer, nor leave to serve a new answer, the General Term directed that the order should be modified by giving leave to re-serve the answer as of the date of the attempted service, so far as affected the date of the issue, with leave to reply to the answer if necessary, or to demur, or to make any motion in respect of the answer on any ground except the regularity of its service; as thus modified the order was affirmed, without costs to either party.

Tracy, Olmstead & Tracy, for the appellants.

R. H. Huntley, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order modified, and as modified affirmed.

ASA F. MILLER, APPELLANT, v. THE NATIONAL STEAMSHIP COMPANY, RESPONDENT.

APPEAL from a judgment of the Special Term, dismissing the complaint.

This appeal is taken from a judgment dismissing the complaint with costs. The bill of exceptions states that at the trial the plaintiff applied for and had leave "to amend his complaint by striking out such matters as might be inconsistent with such amendment, and by inserting instead thereof allegations that the defendant and the National Steam Navigation Company were separate and dis-

tinct corporations; and that the defendant accepted the National Steam Navigation Company's property with distinct agreement to pay the last mentioned company's debts and liabilities." The answer of the defendant was then "so amended as to set up a general denial of these allegations." The plaintiff gave evidence to show that his assignor, on the 23d day of June, 1868, recovered a judgment in the Superior Court of the city of New York against the National Steam Navigation Company for \$3,289.05, damages and costs, on which execution had been duly issued and returned unsatisfied. The judgment roll showed that the recovery was for an injury to the intestate of plaintiff's assignor, which caused the death of such intestate, and that such injury was produced by the wrongful act and negligence of the National Steam Navigation Company in the navigation of the ship *Pennsylvania*, *on the 24th day of October*, 1867, at which time it was alleged the said ship belonged to that company. It showed also that the Navigation Company appeared and by its answer admitted its own incorporation, and that a collision occurred at the time mentioned between the ship *Pennsylvania* and the boat on which the intestate was injured; but put in issue the ownership of the *Pennsylvania* and all other allegations of the complaint. The plaintiff then gave evidence tending to show that the defendant in this action was incorporated under the laws of Great Britain, on the 1st day of July, 1867, by the name of "The Steamship Company limited," and that on the 8th day of August, 1867, its name was changed to "The National Steamship Company limited." That the National Steam Navigation Company, preparatory to a dissolution of that corporation, transferred all its property to two liquidators, under the provisions of the act of parliament, known as "the companies act, 1862," and that said liquidators transferred all of said property to the corporation now sued, on the 16th day of August, 1867, and on that day the Navigation Company ceased to do business, and commenced to wind up its affairs; that such transfer was made substantially upon the agreement and condition that The National Steamship Company should take and accept such real and personal property subject to the rights and equities therein subsisting, and in particular to the discharge of the several liabilities appearing in the books, papers and documents of the Navigation Company, and to all other

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liabilities of the last named company, to which the said real and personal property was then subject, and would bear, pay and discharge in due course the several liabilities disclosed in said books, papers and documents aforesaid, and all other debts, if any, of the National Steam Navigation Company, and would devote and apply the real and personal property, so to be made over to them, for that purpose. The General Term was of opinion that, as the liability to the plaintiff's assignor for an injury which occurred to her intestate on the 24th of October, 1867, could not appear in the books, papers and documents of the Steamship Navigation Company on the sixteenth of August preceding, nor be then a debt or liability of that company which was or could be assumed by the present defendant; and as, when the injury occurred, the National Steamship Company was the owner of the steamship Pennsylvania, engaged in its navigation, and the alleged wrongful act and negligence were its own, and not those of the corporation which was sued, neither on sound law nor logic could it be held that by the agreement made on the transfer of the property, defendant bound itself to pay its liabilities that might thereafter spring out of the wrongful acts and negligence of its own servants; nor did the agreement contemplate or provide for liabilities of that kind which might be asserted by actions improperly brought against the company, which had ceased to do business, and was existing only in the process of winding up its affairs; and that therefore the complaint was properly dismissed, and that the judgment should be affirmed, with costs.

Albert Cardozo and Henry Morrison, for the appellant.

John Chetwood, for the respondent.

Opinion by DAVIS, P. J.

DANIELS, J., concurred.

Judgment affirmed, with costs.

THE UNION DIME SAVINGS INSTITUTION OF THE
CITY OF NEW YORK v. EMMA LOUISA OSLEY AND
OTHERS, RESPONDENTS, AND ADDISON P. SMITH, EXECUTOR,
ETC., APPELLANT.

Surplus moneys—order of reference—object of.

APPEAL from an order vacating and setting aside the report of a referee, made in proceedings relative to surplus moneys. In this matter the claims presented, except one for funeral expenses, were seriously contested. The order of reference was made, however, without objection.

The court at General Term *held*, that the order of reference usually made to ascertain and report the amount of surplus money remaining after a sale on foreclosure, and the liens and claims against the same, and their priorities, is not granted for the investigation and determination of contested claims, but for the purpose of ascertaining liens and claims about which there is no dispute, and to settle the priorities of the liens, that each may be adjusted according to its legal status.

That though the rule is in favor of a referee's report in actions regularly commenced as such, when conflict in the evidence and proof exists, unless the preponderance of evidence is against its propriety, or it is apparent that the referee has clearly misunderstood the evidence; yet the rule is not conclusive even in such cases, and each proceeding stands upon its own elements, to be disposed of as they affect the appellate tribunal.

In this matter, which was a summary proceeding and not an action, and under the circumstances which marked its progress, and the doubt which existed in relation to the counter-claim urged, the court thought it better to compel the parties, claimants, to proceed by action in the usual way, and thus afford the devisees all the benefits arising from the advantages of pleadings, and the tribunals which are by law designated for the investigation and adjudication of disputed claims.

The precedent of submitting such demands to determination on an application to ascertain liens upon surplus funds, does not com-

mend itself. (See *King v. West*, 10 How. Pr., 333; *Husted v. Dakin*, 17 Abb. Pr., 137.) And when the reference is made, as in this case, to ascertain and report, the court should be satisfied by the result, beyond all doubt, before adopting the report that the claims are just and should be paid. The court was not so satisfied, and it directed the funds to be kept in court, or rather on deposit, until the claims should be determined.

R. F. Andrews, for the appellant.

Andrew Blake, for the respondents.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred

Order affirmed, and proceedings referred to a referee to hear and determine the claims.

THE MAYOR, ETC., OF THE CITY OF NEW YORK
RESPONDENT, v. HENRY W. GENET, APPELLANT.

Reference—long account—laches.

APPEAL from an order of the Special Term, denying a motion made by the defendant for a reference.

The gravamen of the complaint in this action is, that the defendant has drawn and received from the comptroller of the city of New York a very much larger sum of money than "was due for services, labor and materials necessary for, and which had been rendered and furnished in and about the construction" and erection of a court-house. The answer denies this allegation. The court held, that though the action was not upon an account, yet the trial of the issue would, doubtless, involve "the examination of a long account," which made the cause a referable one.

The case was upon the calendar of the Circuit Court, for trial, in December, 1874. Instead of moving that court, upon the calendar of which it was placed for trial, the defendant moved in another branch of the same court, before another judge, to take it from the

trial court and send it to a reference, and this motion was delayed until the cause was on the day calendar for trial.

The court was of opinion that it would encourage delay if the discretion of the court should be exercised in favor of the defendant, and that for that reason the reference was properly denied.

Oliver W. West, for the appellant.

John E. Parsons, for the respondent.

Opinion by WESTBROOK, J.

DANIELS and BRADY, JJ. concurred.

Order affirmed with ten dollars costs, besides disbursements, but without prejudice to the right of the trial court to make such a disposition of the action as it may see fit to do.

CHARLES OBERLEY, APPELLANT, v. MARCENA M.
DICKINSON AND OTHERS, RESPONDENTS.

APPEAL from a judgment entered upon the verdict of a jury, directed by the court.

Upon the trial of this action, brought by the plaintiff as indorsee of a promissory note, it appeared that he had taken the note from his indorser as security for a debt which had been repaid; the court charged that he could only recover the difference between what he paid the bank on the protest of the note and what he received from his indorser, to which no exception was taken; the plaintiff's counsel requested the court to charge that he was entitled to recover the amount of the note, with interest, which charge the court refused; subsequently the jury, under the direction of the court, found a verdict for \$4.31, to which no exception was taken. The General Term *held*, that the plaintiff could not recover the full amount of the note, and that if the verdict was too small, the error

was not presented by any exception taken, and affirmed the judgment.

Wm. H. Nafis, for the appellant.

C. P. Hoffman, for the respondents.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

WILLIAM H. PLACE, RESPONDENT, v. GEORGE GREENMAN,
APPELLANT.

Commissions for negotiating sale—when action for cannot be maintained, where plaintiff is employed by both parties to sale.

APPEAL from a judgment in favor of the plaintiff, entered on the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the court before which the trial was had.

This action was brought to recover commissions claimed by the plaintiff to be due to him for negotiating the sale of a steamboat belonging to the defendant. The General Term held, that the evidence showed that, at the time of the sale, the plaintiff was employed by the purchaser to examine the boat and report as to its condition and fitness for the purposes for which it was to be used; that the plaintiff's position under the circumstances of the case was inconsistent with his acting in good faith, and was against good morals and the policy of the law, and he therefore could not recover. (Story on Agency [4th ed.], §§ 30, 210, 212; *Watkins v. Cousall*, 1 E. D. Smith, 65; *Pugsley v. Murray*, 4 id., 245; *Dranghan v. Jinller*, 23 La., 237; *Moenson v. Thompson*, 9 L. T. [Q. B.], 480.)

Wm. Allen Butler, for the appellant.

Ira D. Warren, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., concurred. BRADY, J., concurred in result.

Judgment and order reversed, and a new trial ordered, costs to abide the event.

HENRY BERGH AND OTHERS, APPELLANTS, v. JOHN BUSTEED
AND OTHERS, RESPONDENTS.

APPEAL from an order made at the Special Term dissolving an injunction.

The action is brought by plaintiffs, trustees of the New York College of Veterinary Surgeons, for the purpose of having the election of officers of the board of trustees of the college declared void; that two of the defendants be declared to have forfeited their rights as trustees, and that it be determined whether any of the parties to this action, other than Van Ranst and Crawford, have forfeited their positions as trustees.

The only question presented by this appeal was as to the right of certain of the defendants to act as trustees of the college, the decision of which question depended upon the decision in the case of *Van Ranst v. The New York College of Veterinary Surgeons*, decided at this term and reported *ante*, at page 620.

J. J. Macklin, for the appellants.

Wm. Henry Arnous, for the respondents Van Ranst and Crawford.

Wm. F. Macrae, for the other respondents.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order modified, and as modified affirmed, without costs to either party.

BETHUEL C. WHEELER AND HORACE INGERSOLL,
APPELLANTS, v. WILLIAM S. SEE, RESPONDENT.

Evidence, admitted without objection — when not struck out.

APPEAL from a judgment entered upon the report of a referee. The plaintiffs sued to recover a balance due for feed alleged to have been sold by them to one William H. Mapes. The answer was a general denial.

The theory of the prosecution was that Mapes was defendant's agent in conducting a livery stable business in New York city, and that the sales were really upon the credit of the latter. The opinion of the court was principally devoted to an examination of the evidence in the case. The only question of law in the case was one relating to the striking out of certain rebutting testimony given on the part of the plaintiffs, which it was claimed was not in rebuttal of the defendant's evidence, and should therefore have been given on the examination in chief; the court at General Term *held*, that when evidence pertinent to the issue was thus admitted without objection, it should not be stricken out although the enforcement of the strict rule regarding evidence in rebuttal might have prevented its being admitted.

John B. Perry and *W. W. Niles*, for the appellants.

David Thornton, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed and a new trial ordered, costs to abide the event.

JENNIE E. MESSMORE, RESPONDENT, v. ABRAHAM P.
BLACK, APPELLANT.

THIS is an appeal from an order entered in this action December 29, 1874, vacating an order of discontinuance and substituting one Daniel Messmore as plaintiff in the action.

The suit was brought to recover certain life insurance moneys which had been drawn by the defendant herein, and to which the plaintiff claimed to be entitled.

Upon the trial defendant by way of offset introduced in evidence what purported to be a bond signed by plaintiff, for \$750, as security for rent of a certain house belonging to defendant, and which plaintiff and her husband occupied. While upon the witness stand plaintiff swore that she never executed such a bond, and that what purported to be her signature was a forgery. The judge thereupon decided that "in consequence of the forgery committed by plaintiff's husband, the house-rent cannot be offset." Under this ruling the plaintiff became entitled to judgment for between twelve and fourteen hundred dollars.

After the trial the plaintiff concluded that she might have signed the bond referred to, and she consented to take \$400 in full satisfaction of her claim.

Daniel Messmore then made this application to have the action continued in his name as plaintiff, alleging that he was the owner of the claim against Black, by virtue of an assignment from the plaintiff. The General Term, in view of the conflicting statements contained in the affidavits, modified the order of the Special Term by directing a reference to take proof of the facts alleged in the affidavits, and such other evidence as might be offered, and directed the report of the referee to be made to the Special Term, ten dollars costs and disbursements of appeal to abide event; the present order to stand until further order be made on the coming in of the report.

Erastus Cooke, for the appellant.

Moody B. Smith, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Ordered accordingly.

ALFRED A. KENDALL AND ANOTHER, APPELLANTS, v.
ROWLAND K. BRILL, RESPONDENT.

APPEAL from a judgment in favor of the defendant, entered on the report of a referee.

This action was brought by the plaintiffs to recover of the defendant the sum of \$146.47, for horse keeping, etc.

The defendant denied any indebtedness to the plaintiffs, and set up a counter-claim to the amount of \$875, for the value of a horse and dog-cart alleged to have been sold by plaintiffs for defendant, which counter-claim was denied by the reply of the plaintiffs.

All the issues in the action were referred to E. H. Pomeroy, Esq., who, after duly hearing testimony, etc., on both sides, rendered his report, allowing the plaintiffs the full amount claimed by them, and also the full counter-claim of defendant, and ordering judgment for defendant, in the sum of \$779.15.

The court, after a quite extended review of the evidence in the case, sustained the findings of the referee, without discussing any legal question.

Samuel G. Courtney, for the appellant.

O. D. M. Baker, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Judgment affirmed.

CAROLINA OBERLANDER AND CHARLES OBERLANDER,
APPELLANTS, v. CONSTANTIN ROSSWOG, AND ANOTHER,
RESPONDENTS.

THIS is an appeal from a judgment entered on the report of a referee, dismissing the plaintiffs' complaint, with costs.

This action is upon false representations made by the defendants, respecting certain bonds, by which the plaintiffs were induced to accept them as payment in part for real estate sold to the defendants.

The court, after a very careful examination of the evidence, concluded that the statement of the defendant that "as far as he knew the bonds were good," was substantially a statement that they were worth their face, and as he in fact then knew that they were selling very much below par, that such statement was intended to convey a false impression, especially as the bonds were assumed, in the arrangement for the sale of the real estate, to represent their par value.

Henry D. Beman, for the appellants.

Stephen H. Olin, for the respondents.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, and new trial ordered, costs to abide event.

LUKE MALLOY, RESPONDENT, v. ANN McCONNELL,
APPELLANT.

THIS is an appeal from a judgment against the defendant for \$752.50, entered upon the report of a referee.

The action was brought to recover the value of a quantity of horse feed alleged to have been sold and delivered by plaintiff to defendant, who was executrix of her husband's will, after the death

of the testator, for the use of the testator's estate, alleged to have been used in the feeding of horses belonging to said estate.

The General Term, after a review of the facts, *held*, that the exclusion of evidence tending to show that the defendant did not hold the horses as part of the assets of the estate, and that they belonged to another person, was error, more especially because there was no original contract with defendant in relation to the feed, and if she did not own the horses, her promises to pay for the feed could not be enforced, as they would be made in such case to pay the debt of a third person and be void under the statute of frauds.

Lewis Johnston and *Albert Mathews*, for the appellant.

Nathaniel A. Prentiss, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., concurred in result ; DANIELS, J., concurred.

Judgment reversed and new trial ordered, costs to abide the event.

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THE CONTINENTAL NATIONAL BANK, RESPONDENT,
v. RUSSELL W. ADAMS AND ANOTHER, APPELLANTS.

APPEAL from an order made at Special Term, setting aside a verdict in favor of the defendant, and granting a new trial, on the ground of surprise.

The General Term *held*, that the plaintiff was led, by statements of the defendant, to believe that no serious defense would be interposed at the trial, and that relying thereon he failed to summon a material witness, and therefore affirmed the order. (*Jackson v. Warford*, 7 Wend., 62 ; *Chamberlain v. Lindsay*, 8 S. C. [1 Hun], 231 ; *Tyler v. Hoornbeck*, 48 Barb., 198.)

Wm. A. Jenner, for the appellants.

J. S. Bosworth and *Edward F. Brown*, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

HENRY ALKER, PUBLIC ADMINISTRATOR, AND AS SUCH ADMINISTRATOR, ETC., OF ALANSON MARSH, DECEASED, RESPONDENT,
v. MORITZ SALOMON, EMANUEL SALOMON AND CHARLES SALOMON, APPELLANTS.

APPEAL from a judgment entered on the verdict of a jury, rendered at Circuit, and from an order denying a motion for a new trial.

Action for money laid out and expended, and charges and commissions incurred and earned by the respondent's intestate, while acting, as was alleged, as broker for the defendants in the sale and purchase of gold. The court, after reviewing the evidence, concluded that no error had been committed on the trial, and affirmed the judgment and order.

E. L. Fancher, for the appellants.

A. J. Requier, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment and order affirmed.

THOMAS D. PENFIELD, RESPONDENT, v. SARAH JAMES
AND OTHERS.

THIS is an appeal from an order made by Justice DONOHUE, on the 19th day of December, 1874, requiring Charles A. Seavey to complete his purchase on a sale made in this action, under the judgment of foreclosure herein. The purchase by Seavey was at a second sale ordered in consequence of the failure of first buyer to complete his purchase.

The court was of opinion that most of the points and objections raised by Seavey had already been decided on an appeal taken by the first purchaser, and affirmed the order with ten dollars costs and disbursements. [The decision of the appeal taken by the first purchaser will be found *ante*, page 69.]

Isaac L. Egbert, for the appellant.

Cyrus Lawton, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

THOMAS KENWORTHY, RESPONDENT, v. JOHN D. PHYFE
AND OTHERS, APPELLANTS.

APPEAL from an order made at the Special Term, denying a motion to amend the answer.

The General Term *held*, that, upon the facts of the case, it would not be in furtherance of justice to grant the amendment, and affirmed the order.

Geo. W. Denton, for the appellants.

Lockwood & Crosby, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with ten dollars costs besides disbursements.

GEORGE A. CROFUTT, RESPONDENT, v. ARMSTEAD C.
HENRY, APPELLANT.

APPEAL from an order made at the Special Term denying a motion to set aside an inquest.

The General Term was of the opinion that the papers read on the hearing failed to disclose any defense to the action, and affirmed the order.

Wm. A. Boyd, for the appellant.

Samuel H. Randall, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., concurred.

Order affirmed, with ten dollars costs besides disbursements.

ZACHARIAH DEDERICK AND OTHERS, RESPONDENTS, v. E. A. McALLESTER, APPELLANT.

APPEAL from a judgment in favor of the plaintiffs, entered on a verdict directed by the court.

The General Term was of the opinion that the evidence was such as to authorize the judge to direct a verdict, and affirmed the judgment.

Steels & Boyd, for the appellant.

John A. Mupes, for the respondents.

Opinion by DAVIS, P. J.

DANIELS and LAWRENCE, JJ., concurred.

Judgment affirmed.

EUGENE MIANNAY, RESPONDENT, v. JOSIAH FLETCHER AND OTHERS, APPELLANTS.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The General Term *held*, that the findings of the referee were justified by the evidence, and affirmed the judgment.

J. K. Hayward, for the appellants.

D. R. Jaques, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

THE PACIFIC MAIL STEAMSHIP COMPANY, APPELLANT,
v. RICHARD B. IRWIN, RESPONDENT.

APPEAL from an order made at Special Term, denying motion to strike out an answer as irrelevant, etc. The decision below was affirmed at General Term, the court being of opinion that the allegations which it was asked to strike out, were material, and properly in the answer.

H. S. Bennett, for the appellant.

W. H. Scott, for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs besides disbursements.

MARVIN J. MERCHANT AND ANOTHER, APPELLANTS, v. MILO
M. BELDING AND OTHERS, RESPONDENTS.

APPEAL from a judgment recovered on the report of a referee. The question in the case was one of fact as to plaintiffs' employment by defendants.

The General Term *held*, that the referee was fully warranted by the evidence in taking the view which he did of the plaintiffs' case. He held them not entitled to recover, and the judgment entered upon his report was affirmed.

Francis C. Bowen, for the appellants.

W. B. Putney, for the respondents.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

THE AMERICAN NATIONAL BANK, RESPONDENT, v. JOHN
Z. WESTERVELT, JR., IMPLEADED, ETC., APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The only question presented by this appeal was whether or not the referee erred in rejecting a counter-claim set up by the defendant. The General Term *held*, that the evidence was not sufficient to establish the claim, and affirmed the report.

Hayward & Cranford, for the appellant.

Moody B. Smith, for the respondent.

Opinion by DANIELS, J.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

CAROLINE M. CAMPBELL, ADMINISTRATRIX, ETC., RESPONDENT,
v. WILLIAM HOGE, IMPLEADED, ETC., APPELLANT.

APPEAL from an order of reference, made at the Special Term.

The General Term *held*, that the action, as stated in the complaint, was referable, and affirmed the order. (*Welsh v. Darragh*, 52 N. Y., 590.)

John E. Burrill, for the appellant.

George H. Forster, for the respondent.

Opinion by DAVIS, P. J.

BRADY and DANIELS, JJ., concurred.

Order affirmed, with ten dollars costs, besides disbursements.

FREDERIOKE E. KUSE, ADMINISTRATRIX, ETC., RESPONDENT, v.
THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, APPELLANT.

APPEAL from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

The only exception insisted on upon this appeal was that the court should have dismissed the complaint. The General Term *held*, that the evidence was such as to require a submission of the case to the jury, and affirmed the order.

Calvin G. Child, for the appellant.

D. R. Jaques for the respondent.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed.

BERNHARD MAYER, RESPONDENT, v. THE MAYOR, ETC.,
OF THE CITY OF NEW YORK, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered on the verdict of a jury.

The General Term, at the October term, in 1874, overruled a demurrer to the complaint in this action, the opinion being reported in 9 Supreme Court Reports (2 Hun), 306. The General Term *held*, that no new questions were presented upon this appeal, and adopted the former opinion as a sound exposition of the law.

D. J. Dean, for the appellant.

Neville & Andrews, for the respondent.

Opinion by DAVIS, P. J.

DANIELS and BRADY, JJ., concurred.

Judgment affirmed.

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IN THE MATTER OF THE PETITION OF HENRY BAINBRIDGE AND OTHERS, EXECUTORS, TO HAVE REVIVED AND CONTINUED AN ACTION COMMENCED AND PENDING BETWEEN RICHARD BAINBRIDGE, PLAINTIFF, AND CHAS. F. LIVERMORE AND OTHERS, DEFENDANTS.

Revival of action.

APPEAL by defendants from an order made at Special Term, granting leave to revive, etc. The application was not made until several years after the death of the party, the plaintiff being under a stay of proceedings.

The court *held*, that the revival of an action by the representatives of a deceased plaintiff, was not a proceeding contemplated by, or embraced within the prohibition of a stay of proceedings. That it could not be regarded as a proceeding other than to prevent the abatement of the action. That the authorities required the motion to revive to be made within the year, under section 121 of the Code. (*Allen v. Walter*, 10 Abb., 379; *Matter of Bornsdorff v. Lord*, 41 Barb., 211; *Coon v. Knapp*, 13 How. Pr., 175; *Gordon v. Sterling*, id., 405; *Greene v. Bates*, 7 id., 296.)

E. P. Wheeler, for the appellant.

Robert Sewell, for the respondents.

Opinion by BRADY, J.

DAVIS, P. J., and DANIELS, J., concurred.

Order reversed, with ten dollars costs besides disbursements.

Cases

DETERMINED IN THE

THIRD DEPARTMENT

AT

GENERAL TERM,

June, 1875.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENTS, *v.* THE CITY OF ALBANY, THE ALBANY AND GREENBUSH BRIDGE COMPANY AND ANOTHER, APPELLANTS.

Right of city to dispose of its property—when court of equity will interfere—Ferry franchises—sale of, by municipal corporation.

Although a city, in a certain sense, holds all its property, franchises and powers in trust for its inhabitants, yet such property may be sold and conveyed by it, except where the property has been conveyed to it in trust for a specific purpose within its proper province, in which case a court of equity will interfere to prevent a misappropriation of the fund or a misuse of the property.

All property of a private nature belonging to a corporation, upon which no specific trust is imposed, may be sold by the corporation; but property of a public nature, such as streets, etc., so long as they are held for the public use, cannot be sold.

Where the legislature has granted to a city the exclusive right to establish and control the ferries therein, and a ferry has been established and for a long time maintained at a particular point therein, the city may, at its pleasure, sell and convey the real estate owned by it in connection with such ferry to any person, provided the public be not cut off, by the sale, from the means of intercommunication.

APPEAL from an order made at the Special Term, granting an injunction restraining the city of Albany from conveying to the

Albany and Greenbush Bridge Company what is known as the south ferry property, and the real estate connected therewith, and restraining the bridge company from taking or using the said premises for the purposes of erecting a bridge over the Hudson river at that point.

A. J. Colvin and *A. J. Parker*, for the City of Albany and the Albany and Greenbush Bridge Company, appellants.

Grenville Tremain, for the Mayor of Albany.

H. Smith and *W. P. Prentice*, for the respondents. The granting and continuing of injunctions rests in the discretion of the court, to be governed by the nature and circumstances of the case. When granted upon a thorough examination of the whole case, *pendente lite*, where immediate relief is necessary to prevent irreparable injury, and its continuance involves nothing of importance except delay until the case can be tried and its issues upon important questions decided, the action of the court below will not be reviewed. (*Vandewater v. Kelsey*, 1 N. Y., 533; *Selden v. Vermilye*, id., 534; *Paul v. Munger*, 47 id., 469.) And this is the case, even though the answer deny the equities of the complaint. (*Roberts v. Anderson*, 2 Johns. Ch., 202; *Carpenter v. Danforth*, 19 Abb., 225; *Attorney-General v. Cohoes Co.*, 6 Paige, 133; *Malcolm v. Miller*, 6 How. Pr., 456; *Dubois v. Budlong*, 15 Abb., 445; *Litchfield v. Pelton*, 6 Barb., 187.) The power to grant the injunction in the first place cannot be denied. (*Attorney-General, etc., of N. Y. v. The Mayor, etc.*, 3 Duer, 119; *People v. Sturtevant*, 2 N. Y., 263; *People v. Mayor, etc.*, 9 Abb., 253; *People v. Vanderbilt*, 26 N. Y., 287; *Lawrence v. Mayor*, 2 Barb., 577; *Benson v. Mayor*, 10 id., 223.) The right of the plaintiffs to maintain this suit and seek this remedy, cannot be questioned. (*The People v. The Mayor*, 32 Barb., 102; *The People v. The Mayor*, 10 Abb. Pr., 144; *Bensen v. The Mayor*, 10 Barb., 223; *The People v. The Canal Board*, 55 N. Y., 390; *The People v. Vanderbilt*, 38 Barb., 282.) The corporation of the city of Albany has not the right to sell the "south ferry property" to the Albany and Greenbush Bridge Company. (*People v. Kerr*, 27 N. Y., 189; *Davis et al. v. The Mayor, etc., of N. Y. et al.*, 14 id.,

506; *Kellinger v. Forty-second St., etc., R. R. Co.*, 50 id., 208.) The charter (see title 1, § 3, and title 3, § 13; Laws of 1870, p. 159) gives only the power "to establish, license and regulate all ferries," and not to destroy a ferry in existence before the act was passed. No additional powers in the common council are to be inferred. This ferry is held for the public use, and the only rights the city of Albany has over it are as of a *trust publici juris*, not for the people of the city alone, but for the people of the whole State, and as an agent. (*People v. Kerr*, 27 N. Y., 181; *Davis and ors. v. Mayor, etc., of New York*, 14 id., 506; *People v. Vanderbilt*, 38 Barb., 282; *Kellinger v. Forty-second Street, etc., R. R.*, 50 N. Y., 208, and cases above cited.)

BOARDMAN, J.:

By an act of the legislature (chap. 269, Laws of 1872) the Albany and Greenbush Bridge Company was constituted a body corporate, with power to build a bridge across the Hudson at Albany, at some point to be determined by commissioners in the act named. By this act the bridge company was authorized to take and hold the necessary real estate for that purpose. The bridge company was duly organized under said act, the capital stock subscribed, and, in the fall of 1874, the site of said proposed bridge was located opposite the south ferry property. This south ferry property had long been owned by the city of Albany, and used in connection with a ferry at that point between Albany and Greenbush. In October, 1874, such proceedings were had by and between the bridge company and the city, that the common council of the city passed a resolution for the sale of this south ferry property to the bridge company, for the sum of \$23,500. This resolution was vetoed by the mayor, but was, on the seventh of December thereafter, passed over the mayor's veto. In connection with the resolution for the sale as finally passed, provisions, conditions, contracts and penalties were imposed, or to be imposed, in connection with the sale and conveyance of the property, upon the bridge company, to obviate, as far as was thought practicable, any danger of obstruction to the navigation of the river. These resolutions and provisions were acceded to by the bridge company, and made a part of the contract for the purchase of the real estate.

At this stage of the business this action was commenced, and soon after the injunction was procured. The principal, if not the only, reason assigned for granting the order, was this: That the city owned the south ferry real estate, in connection with the ferry, by such a title, and under such trusts, that a sale thereof, or of such real estate, was impossible, illegal, and in violation of the trust; that the ferry franchise and property belonged to the city, and was and is inalienable by the city without legislative sanction.

Upon this appeal, we are called upon to decide whether this view taken by the learned judge at Special Term is correct, or whether, on the contrary, the city has not the right, power and authority to sell the real estate in the same manner and with the like effect with any other lands owned by it. We think the court at Special Term was right in saying that was the only subject in dispute. The right of the legislature to pass the act of 1872 is conceded. The right of the Albany and Greenbush Bridge Company to erect a bridge between Albany and Greenbush, under and by virtue of that act, must also be conceded. The location of the bridge cannot be a subject of controversy. If the city cannot sell this real estate, and the bridge company cannot acquire title thereto, the location at that point is settled and rendered impossible; but if title can be made, the location at that point may be sustained, so far as any determination of this appeal can affect it. Nor is it of any importance whether any location of the bridge has yet been made. The effort to purchase is with the intent to locate at that point. For that purpose, the company has the right to acquire real estate; and this court cannot adjudge, upon this application, that the company cannot, within the act of the legislature, purchase this property, for the reason that it is not necessary. Equally foreign from our present consideration are the possible or even probable consequences to result to commercial and business interests from the erection of a bridge at the proposed locality. We have no power to enjoin the building of a bridge sanctioned by the legislature, nor have we any control over its location, except as other interests and rights are visibly and wrongfully affected. Divested of these extraneous matters, there remain to be decided two questions only: Has the city the right to sell and convey to the bridge company the real estate, known as the south ferry property, for the uses

and purposes contemplated by said company? If it has not that right, can the people of the State of New York maintain this action to restrain the city, or are they proper parties plaintiff in this action? The plaintiffs claim that the city has not the power of sale, because it holds the property in trust, and such sale would be in violation of such trust. Neither the complaint nor any of the moving papers assert the existence of any such trust, or claim relief by reason of any threatened breach of trust on the part of the city or its officers. Does such a trust as will prevent this sale exist? In a certain sense the city holds all its property, franchises and powers in trust for the inhabitants. But it is not contended that property so held may not be sold and conveyed as effectually as by an individual. But where the property is conveyed to the municipal corporation in trust for a specific purpose within the proper province of a corporation, equity will assert its jurisdiction to prevent a misappropriation of the fund or a misuse of the property. Is this real estate held by such a title? By the Dongan charter, power was given to Albany to establish, etc., all ferries, etc., "necessary, needful and convenient for the inhabitants of said city and the parts adjacent, and for travelers there." The franchise thus given is not exclusive. Afterward the legislature of the State of New York, in which the power alone existed, gave to the city the *exclusive* right to establish and control ferries. (Laws of 1826, p. 201, § 48; 1842, p. 361; Laws of 1870, p. 159, § 3.)

By these acts, the city of Albany has acquired not merely a legislative power, but a proprietary right. (*Aikin v. Western R. R. Co.*, 20 N. Y., 370.) If the city was thus the absolute owner of this franchise and property by legislative grant, it could sell and convey such corporate estate at its pleasure. (*Costar v. Brush*, 25 Wend., 628.) It was held as its city hall, or jail, or other property, and was in no sense a trust estate inalienable. All property of a private nature belonging to a corporation may be sold. The right of sale, if not expressed in its charter, will be implied. The right to hold such property carries with it the right by implication to sell; but property of a public nature, such as streets, squares and parks, so long as they are held for the public use, cannot be sold. Doubtless the same rule would apply to a ferry franchise if the public were, by its sale, to be shut off from the means of inter-communi-

cation. In the present case the real estate in question is private property, kept for profit in connection with the ferry franchise. The location of the ferry is in the discretion of the city. It need not necessarily be in its present location. If its site is removed to another point, this real estate is no longer necessary for the city, and may be sold. Should a bridge be erected near this ferry, so as to render it worthless and incapable of being run with profit, it cannot reasonably be contended that the city would not have the right to convert this real estate to other uses, or to sell it. The same would be true if the city removed the ferry to some other point. The real estate is not therefore any part of the ferry franchise; nor is it held by any inalienable title arising from the terms of the grant, or the uses for which it was granted or is used. If the city has the power to convey, the location of the bridge at that point is not in itself objectionable. As the ferry is for the public use and convenience, so will the bridge be. Experience is fast demonstrating that bridges are better and more useful than ferries. The rights of trade, commerce and travel by the course of the river, are to be recognized and protected; but such rights are not superior to those of trade and travel across the river, and each must yield something of its best interests to the necessities of the other.

Having concluded that the south ferry real estate was alienable by the city, and that the contemplated sale was not illegal or in violation of any trust or duty by the city of Albany, it will necessarily follow that this action cannot be maintained. Hence, it becomes unnecessary to consider the right of the people to bring this action.

If any injury shall arise by the wrongful dissolution of this injunction, it will fall most heavily upon the bridge company, if it shall proceed to expend its money in the erection of a bridge before the final termination of this action. As this decision is not final and conclusive, the bridge company will act at its peril in the further prosecution of its enterprise. Such consequences are a sufficient guarantee against any reckless or indiscreet conduct upon its part.

I think the order of the Special Term granting the injunction should be reversed, with ten dollars costs and expenses of printing,

to be paid by the plaintiff to appellants, and the motion for an injunction denied with ten dollars costs.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Ordered accordingly.

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THE TOWN OF PIERREPONT, RESPONDENT, v. WILLIAM
D. LOVELASS AND OTHERS, APPELLANTS.

Service of subpoenas — expense of, cannot be included in costs.

The expenses incurred by a party in serving subpoenas upon witnesses, cannot be allowed by the clerk as a necessary disbursement, under section 811 of the Code.

APPEAL from an order made at the Special Term, denying a motion of defendant for a retaxation of costs, and for the striking therefrom the sum of \$55.66, charged and allowed the plaintiff for serving subpoenas upon witnesses.

Parker & McIntyre, for the appellants.

Sawyer & Russell, for the respondent.

BOARDMAN, J.:

The clerk was wrong in allowing the plaintiff the expenses incurred in serving subpoenas upon witnesses. The necessary disbursements, under section 311 of the Code, are not intended to cover ordinary disbursements of the parties to suits, but only such as are incident to the regular proceedings in the action. (*Case v. Price*, 17 How., 348.) It has been held that the "fees allowed by law" are those, only, given by 2 Revised Statutes, 634, etc. (*Dewitt v. Swift*, 3 How., 280; 6 Leg. Obs., 314; *Moore v. Cockroft*, 9 How., 479), or the Code. No allowance was given by the Revised Statutes for such services (*Rogers v. Rogers*, 2 Paige, 460, 464), nor does the Code make any such specific allowance. But, by section 303, certain allowances are authorized "by way of indemnity for the expenses in the action."

I think the practice of the profession is hostile to such an allowance. I find no authority for it. On the contrary, there is a uniform current of opinions recognizing such charges as improper. (*Burnett v. Westfall*, 15 How., 430, where the point is directly decided at Special Term; *Wheeler v. Lozee*, 12 id., 446, where it is inferentially decided; Voorhies' Code, 1864, p.615; 3 Wait's Pr., 504; Wait's Code., 622; 2 Whittaker Pr., 948; Howard's Code, 518; 2 N. Y. Pr. [Tif. & Sm.], 436; 2 Til. & Shearm. Pr., 630.)

In hostility to this view, I do not find a single case or text writer since the Code. Tillinghast and Shearman (*supra*), while recognizing the law as stated, think it wrong, and that at least twelve and one-half cents should be allowed for each witness subpoenaed, in analogy to the old chancery practice, citing 2 Paige, 458, and 6 Paige, 170.

The court has power, by extra allowances in proper cases, to reimburse a party to some extent for extraordinary expenditures. Full indemnity is not contemplated, nor are the allowances of costs fixed by the Code upon any such idea.

I think it better to rely upon the power undoubtedly possessed by the courts, than to adopt a rule which might, and in many cases would, lead to intolerable consequences. The process of subpoenaing witnesses falls naturally into the hands of the party, or his agents and servants. Not infrequently the same persons who serve the process, ascertain and decide whether the witness is necessary or not. Nor is there any principle upon which banks, railroads, insurance companies, or other corporations, should be an exception to the rule. If allowed at all, it would be as compensation of time and labor. An individual is as well entitled to such compensation as an officer or the agent of the corporation.

I think the order of the Special Term should be reversed, with ten dollars costs and printing fees, and that the motion for readjustment, and for striking out as herein stated, should be granted.

Present — LEARNED, P. J., and BOARDMAN, J.

Ordered accordingly.

NATHANIEL ENGLISH, PLAINTIFF, v. THE PRESIDENT,
ETC., OF THE DELAWARE AND HUDSON CANAL
COMPANY, DEFENDANT.

Removal of passenger from railroad car — Evidence of attempt to avoid payment of fare on other occasions — Right to resist conductor.

In an action brought for the recovery of damages, alleged to have been sustained by the plaintiff by being improperly removed from defendant's cars after having paid his fare, evidence going to show that on other occasions plaintiff had done acts showing an attempt to avoid payment of his fare, is properly rejected.

A charge that plaintiff had a right to resist the conductor's attempt to put him off the car, if he was rightfully there, *held*, proper.*

MOTION for a new trial, on exceptions ordered to be heard in the first instance at the General Term, after a verdict for plaintiff.

The action was for damages caused to plaintiff by his being illegally ejected from defendant's cars, upon a claim of non-payment of fare.

The defendant claimed, among other things, that the evidence of a witness, named Martin, as to the credibility of the plaintiff, was improperly admitted, as he was not shown, as defendant claimed, to have had knowledge of his reputation, or to have lived in the neighborhood of the plaintiff.

O. W. Chapman, for the plaintiff.

J. G. Runkle, for the defendant.

BOARDMAN, J.:

By the verdict of the jury it is established that the plaintiff had once paid his fare when it was a second time demanded, and that, as a consequence, his ejection from the cars was wrongful. It is also determined that the action of the conductor was within his authority, and in the line of his duty, as he claimed the facts to be. The amount of damages is also fixed by the verdict. None of these questions can properly come before us upon this motion for a new trial. Nothing but the exceptions taken upon the trial is here for review. (3 Wait's Pr., 433, and cases cited.)

* See, upon this point, *Townsend v. N. Y. C. and H. R. R. Co.* (56 N. Y., 301). — REP.

The exceptions may be briefly disposed of. Defendant offered to show that plaintiff, on other occasions, had done things which would justify the jury in imputing to him a motive to avoid payment of fare. If, on this occasion, he had paid his fare, he was entitled to his passage, whatever his past conduct may have been.

Martin's evidence as to plaintiff's character was admissible for what it was worth. The distance Martin lived from plaintiff, the degree of acquaintance with plaintiff, and with the community in which plaintiff lived, were elements in the value of Martin's estimate of character, but do not affect its admissibility.

There was no error in the charge that plaintiff had the right to resist the conductor's attempt to remove him from the car, if rightfully there. The conductor was in the wrong, and plaintiff had a right to resist such wrong. Whatever consequences followed such resistance, are chargeable to defendant, so long as the conductor was engaged in putting plaintiff off the cars. Especially is this true when the attempt to put him off was while the cars were still in motion. Self preservation was a sufficient justification of extreme resistance. (*Sanford v. Eighth Av. R. R.*, 23 N. Y., 343; *Hamilton v. Third Av. R. R.*, 35 Supr. Ct. R., 118.)

The charge of the learned judge was eminently fair, and as favorable to defendant as could be properly demanded.

The facts have been determined by the jury, and cannot be reviewed upon this motion. No error appears in the rulings or charge of the court.

The motion for a new trial must therefore be denied, and judgment ordered for the plaintiff on the verdict, with costs.

JAMES, J., concurred.

Judgment affirmed, with costs.

RICHARD F. HARRISON, APPELLANT, v. JAMES L. CLARK,
RESPONDENT.

Justice of the peace—jurisdiction of—liability of, for issuing warrant on defective affidavit.

The defendant, a justice of the peace, issued a civil warrant for the arrest of the plaintiff, upon an affidavit which failed to state that plaintiff was a resident of the county and not a freeholder, when in fact he was a resident of the county and a freeholder. *Held*, that the justice acted judicially in passing upon the sufficiency of the affidavit, and that he was not liable to an action for false imprisonment for causing the arrest of the plaintiff.

APPEAL from a judgment dismissing the complaint in an action for false imprisonment, brought against the defendant, a justice of the peace, for issuing a civil warrant upon a defective affidavit.

A. X. Parker, for the appellant.

Sawyer & Russell, for the respondent.

BOARDMAN, J. :

The defendant, as a justice of the peace, had jurisdiction to issue process against the plaintiff. As justice he had jurisdiction of the subject-matter for which his process issued. An affidavit was presented containing most of the facts necessary to justify the issuing of a civil warrant. But it was deficient in not stating that Harrison was a resident of St. Lawrence county, and not a freeholder. In fact Harrison was a resident of the county, but he was a freeholder, so that he was not within the statute authorizing a civil warrant. Upon such affidavit the warrant was issued, and Harrison constructively arrested. Upon the hearing before the defendant, after one adjournment, plaintiff was discharged. The plaintiff now brings this action against the justice for false imprisonment. Upon the trial the complaint was dismissed, upon the ground that defendant acted judicially in issuing the warrant upon such affidavit. Upon the authority of *Rogers v. Mulliner* (6 Wend., 597), the dismissal of the complaint would be justified, upon the principle that defendant was acting ministerially in issuing a process within

his jurisdiction at the request of a party, so long as such act was in good faith. That was a civil warrant issued without any oath whatever. In this case the warrant was applied for on the affidavit of Mary A. Stone.

But I prefer to sustain this judgment upon the ground that the defendant, acting as a court of limited powers, had jurisdiction of the subject-matter involved, and the right to issue process against Harrison. The affidavit being presented to him, he was called upon to determine and decide as to the appropriate process. In so doing he acted judicially, and if he erred, his proceedings were voidable, but not void. (*Horton v. Auchmoody*, 7 Wend., 200; *Stewart v. Hawley*, 21 id., 554; *Lewis v. Rose*, 6 Lans., 206.) That he was acting judicially in passing upon the sufficiency of the affidavit, is shown by the cases of *Stewart v. Brown* (16 Barb., 367, 369); *Harman v. Brotherson* (1 Denio, 537); *Payne v. Barnes* (5 Barb., 465, 467). Even in cases where the affidavit, as to the essential facts, was upon information and belief, the officer will acquire jurisdiction. (*Campbell v. Ewalt*, 7 How., 399; *Harman v. Brotherson*, *supra*.)

I am aware of cases which hold that the officer does not acquire jurisdiction where the preliminary papers are not such as to authorize the issuing of process. While such cases are just as to others than the justice, I think a different rule should and does apply to him when acting in good faith, and when such action is founded upon a judicial determination as to the sufficiency of the affidavits, bonds or other papers presented to him as the basis of his action. I am the more willing to accept such conclusion in this case, since the plaintiff was not restrained of his liberty or controlled in his movements, except voluntarily to attend before the justice, and suffered little beyond nominal damages by reason of defendant's action.

I think the judgment should be affirmed.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

CALVIN GRAVES, SURVIVING EXECUTOR, ETC., v. RENSSELAER WATERMAN, ADMINISTRATOR, ETC., APPELLANT,
AND HELEN STEWART, ADMINISTRATRIX, ETC., RESPONDENT.

Trustee — may purchase from cestui que trust.

There is no rule of law which prevents a trustee from purchasing from a *cestui que trust* his interest in the trust estate. But the courts will examine all such transactions with care, in order to see that no undue advantage has been taken of the *cestui que trust*.

APPEAL from a judgment in favor of the defendant Helen Stewart, administratrix, etc., entered on the report of a referee.

This is an action of interpleader, brought by the surviving executor of Chandler Root, deceased, to determine which of the two defendants is entitled to that residuary share of the estate of Chandler Root, which, by his will, was given to Erastus C. Root, deceased. One of the defendants, Helen Stewart, is the administratrix of Erastus C. Root, deceased, and claims as such administratrix. The other defendant, Rensselaer Waterman, is administrator of Mary Ann Root, deceased, and claims, as such administrator, by virtue of a certain assignment, made by Erastus C. Root to said Mary Ann Root, who was his mother.

By the will of Chandler Root, after the payment of certain legacies, so much of the estate as would produce \$600 per annum for the widow during her life, was to be set apart. At her death this principal sum was to go equally to his heirs. All the residue of his estate was to be divided equally among his children, when the youngest should arrive at twenty-five. That event took place May, 1873, and Mary Ann Root had died in February, 1871. Erastus C. Root was one of the five children, and it is his share of the residue (including that set apart for the widow's income) which is in dispute.

After Erastus C. Root had become of age, and in 1857, he received his specific legacy, under the will, of \$4,000; went into business and became insolvent. Afterward, in 1858, he returned to the house of his mother, Mary Ann Root, and she boarded and clothed him, and furnished him with necessary spending money till the fall of 1869. He then went to New York city to attend

medical lectures, and Mary Ann Root furnished the necessary moneys from her own funds. After his return to his mother's house from attending said lectures, and on the 26th day of March, 1860, he executed, at her request, under hand and seal, a writing, assigning to her all his right, title and interest, which he had as heir at law, devisee or legatee of Chandler Root. The consideration, as expressed therein, was one dollar, and the aid and assistance furnished him by her in boarding expenses, while endeavoring to qualify himself to practice medicine. The instrument was duly acknowledged and delivered March 27, 1860, and was recorded in the clerk's office, January 14, 1861. He continued to board with his mother till the fall of 1860, and she paid his expenses. He then went again to New York to attend medical lectures, and his mother furnished him money to pay his expenses. About November, 1861, the said Mary Ann Root, from her own means, furnished him with from \$300 to \$400, to purchase an outfit as second lieutenant in the army.

At the time when he made the assignment, he was indebted to sundry persons, which debts have not been paid. He died in the spring of 1866. His widow married again, and was appointed his administratrix, September 13, 1869.

Mary Ann Root was an executrix of the will of Chandler Root, and there were three executors. She did not attend personally to any of the duties of receiving, investing and disbursing the moneys and funds of the estate.

This case was tried before a referee, who reported in favor of Helen Stewart, administratrix. Reusselaer Waterman, the administrator of Mary Ann Root, appeals.

Samuel A. Bowen, for the appellant.

H. Sturges, for the respondent.

LEARNED, P. J. :

The first claim of the administratrix of Erastus C. Root, is, that the assignment was void, because it was made to hinder, delay and defraud creditors. The referee does not so find ; and there was no evidence of such actual intention. Although no consideration passed at the time of executing the assignment, yet the assignee,

Mrs. Root, had supported the assignor for two years, and had paid his expenses in attending medical lectures. It is not shown how much she had paid. But we cannot assume that it was so inadequate as to indicate fraud. The assignment was public. Creditors seem to have made no attack on its validity for the six years, from its execution till the death of Erastus C. Root. And it must be remembered that the share which was assigned, was not payable until the death of Mrs. Root, so that its value, estimated at the time of the assignment, was much less than it now is.

Second. It is suggested that Erastus C. Root was entitled to his support from the estate under the third clause of the will. But a fair construction of the whole is, that the support was only till he was of age. The widow, as guardian, was to educate and support the children "while under lawful age." A legacy of \$4,000 to each child was to be paid to the sons as they came of age. It is reasonable to understand that the claim for support was then to cease.

Third. But the real ground of the claim made by the administratrix, and that upon which the referee has decided in her favor, is, that the assignment was void, because it was "such a dealing with the property in trust as is forbidden by law." The administratrix urges that Mary Ann Root was a trustee, and that a trustee may not deal with the subject of the trust. This is undoubtedly a well settled rule. Its meaning is, that a trustee, holding trust property, cannot, by any transaction with himself, change that property into his own. He cannot make a bargain with himself. This principle is thoroughly explained, and numerous cases are cited, in *Gardner v. Ogden* (22 N. Y., 327). The trustee, by making what purports to be a sale of the trust property to himself, does not change the character in which he holds the property. And so if, as trustee, with trust moneys, he buys from himself, the sale is invalid. And the principle is so well settled, that the courts will not inquire, at the instance of the trustee, whether the bargain may not, in fact, have been beneficial to the *cestui que trust* but will hold it to be void.

But that rule does not apply to the transaction in question. Mary Ann Root, as executrix, did not attempt to sell to herself, in

her own right, any trust property. Nor did she, in her own right, attempt to buy from herself, as executrix, any trust funds. If she had, as executrix, sold and transferred to herself in her own right, a part, or the whole, of the securities which she held, that would have been a transaction within the rule ; and at the instance of Erastus C. Root, the *cestui que trust*, it could have been declared void.

A single consideration will show the distinction. In all these instances, where dealing with trust property by a trustee has been held void, it has been done on the application of the *cestui que trust*. If he chooses to affirm the transaction, he may ; and he can thus hold the trustee to the attempted bargain. Now in the present instance, Erastus C. Root was the very party with whom the transaction was had. He affirmed it when it was made. His executrix cannot disaffirm.

But furthermore : a purchase by a trustee from his *cestui que trust*, of the latter's interest in the trust property, is not in the least within the rule above mentioned, or within its reason. It is not a buying from himself. It is not a dealing with the trust property. It is a dealing simply with the *cestui que trust*. The rule is often said to rest on the inconsistency of permitting the same person to be both buyer and seller. That inconsistency does not exist in a case like this. We may put this in another light. Could not Mary Ann Root have paid Erastus C. Root his share, at that time, if she had chosen so to do ? And if she had done this, would the transaction have been affected by her taking an assignment to herself of his interest ? For we must notice that the claim of the administratrix is not that Mary Ann Root did not pay enough to her son ; but that she could not buy at any price. The rule on which the administratrix insists, correctly stated, is not that the trustee shall not deal with the *cestui que trust*, but that he shall not deal with the trust property. The distinction may be illustrated by reference to the case of *Gardner v. Ogden*. In that case the plaintiff had made the defendant his agent to sell land. The agent (or rather his clerk, who of course stood in the same position) negotiated a sale to this clerk. The plaintiff did not know that it was his agent's clerk who was making the purchase, and the sale was declared void. But let us suppose that the agent, *openly and in his own name*, had made an offer to the plaintiff for

the land, and the plaintiff, knowing that it was his agent who made the offer, had accepted it, would such a sale have been held void? Clearly not. It would have lacked the very element which made the actual transaction in that case objectionable.

Fourth. But there is another principle applicable to this present case, which the court below may have confounded with that above discussed. That principle is, that a court of equity will scrutinize carefully all transactions between persons standing in a confidential relation, one to the other. And, therefore, the circumstances under which this assignment was made, may be examined in order to see whether undue advantage was taken. Now, on this point it is important to observe, that no claim of this sort was made by the administratrix. Her position seems to have rested solely on the alleged illegality of the transaction. Nor is there any evidence to lead to the conclusion that Mary Ann Root took advantage of her son in obtaining this assignment. He was a man of full age; capable, so far as appears, of taking care of himself. She was his mother, apparently desirous to aid him in his troubles. She continued to supply his expenses after the assignment, and, furthermore, purchased his outfit in the army, so that there was no apparent intention to do him wrong. Indeed, it would seem probable that, in fact, he received the full value of his interest. Twelve years after the assignment, his interest in the estate is found to be about \$3,700. If we deduct interest for that period, its value at the time of the assignment would be not more than half that amount. He seems to have received about two years' board and clothing and the expenses of medical lectures, before the assignment, and other board and expenses afterward, besides the outfit of \$300 to \$400. Under all the circumstances, therefore, there is no reason to set aside the assignment on the ground of actual fraud or imposition.

The judgment should be reversed, so that after the payment of costs to all parties out of the fund, including costs of appeal, the balance should be paid to the defendant Rensselaer Waterman, administrator.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Ordered accordingly.

EVERT EVERTSEN, RESPONDENT, v. THE NATIONAL
BANK OF NEWPORT, APPELLANT.

Coupons — same as bank bills — right of bona fide purchaser of stolen coupons.

Coupons separated from their bonds are, in law, regarded as bank bills, and a *bona fide* purchaser, in the usual course of business, for full value, without notice, will be protected, although the coupons were overdue when sold, and were stolen by the party disposing of them to the purchaser.

APPEAL from a judgment entered upon the report of a referee in favor of plaintiff.

The defendant purchased from its customers coupons of railroad bonds due April 1, 1871, and sent them by express for collection. They were stolen from the express company and sold to the plaintiff, a banker, in the ordinary course of his business, without notice of the theft, on April 3, 1871. The defendant stopped payment of the coupons. Upon suit being brought by plaintiff against the railroad company, the money was paid into court, and the defendant was substituted in place of the railroad company.

A. M. Mills, for the appellant. The plaintiff is not a *bona fide* holder of negotiable commercial paper, and so entitled to be protected as against the true owner of the coupons. It is only he who purchases innocently, in the course of trade for a valuable consideration, commercial paper *not overdue*, that is protected. (3 Kent's Com., 78; *Farrington v. Park Bank*, 34 Barb., 645.) A recent case decided in the Supreme Court of the United States settles this question. (*Vermilyea v. The Adams Ex. Co.*, 11 Alb. Law Jour., 189, March 20th, 1875.) These coupons are *sui generis*; they are not money, nor promissory notes, nor independent instruments, but only the detached parts of an entire contract certifying that certain money is due by virtue of that contract. (*Clarke v. City of Janesville*, 1 Bissell, 98.)

N. C. Moak, for the respondent. Bonds issued by a corporation under its seal are negotiable securities and pass by delivery. (*Brainard v. N. Y., etc.*, 25 N. Y., 496; *Lindsley v. Diefendorf*,

43 How. Pr., 357; *Blake v. Board of Suprs.*, 61 Barb., 149; *Moran v. Comrs.*, 2 Black, 722; *Mercer County v. Hackett*, 1 Wall., 83; *Gilpeke v. Dubuque*, id., 176; *Clapp v. Cedar County*, 5 Iowa, 15; *Ring v. Johnson County*, 6 id., 265; *Matter of Imperial, etc.*, L. R. [11 Eq.], 478, 486, 495; 7 Am. Law Rev., 71; *Hvidekoper v. Buchanan County*, 1 Cent. Law Jour., 177.) And a *lis pendens* will not prevent a *bona fide* purchaser from obtaining a good title thereto. (*Lindsley v. Diefendorf*, 43 How., 357; *Durant v. Iowa City*, 1 Woolw. C. C., 69, 83; *Leitch v. Wills*, 48 N. Y., 585.) The coupons issued with such bonds, after being detached, are treated and regarded as bank bills and currency, and may be sued though the owner be not the holder of the bond. (*Spooner v. Holmes*, 102 Mass., 507; 6 Alb. Law Jour., 235; *Nat. Ex. Bank v. Hartford, etc.*, 8 R. I., 375; *City of Memphis v. Brown*, 5 Am. Law Times, 433, and numerous cases cited; 7 Am. Law Rev., 71; *Sewell v. Brainard*, 38 Vt., 364; *Miller v. R. and W. R. R. Co. et al.*, 40 id., 399; *Wohey v. Pole*, 4 Barn. & Ald., 1; *Matter of Imperial, etc.*, L. R. [11 Eq.], 478, 486, 495; *Durant v. Iowa City*, 1 Woolw. C. C., 69, 72; *Murray v. Lardner*, 2 Wall., 110; 1 Am. Lead. Cas. [5th ed.], 407, 410; *Langston v. South Carolina R. R.*, 2 S. C. [N. S.], 248; *Commonwealth v. Emigrant Industrial, etc.*, 98 Mass., 12; *Haven v. The Grand Junction R. R. Co.*, 109 id., 88; *City of Lexington v. Butler*, 14 Wall., 82; *McCoy v. Washington County*, 3 Wall. Jr., 381.) One who takes a stolen bank bill in good faith obtains a valid title thereto. (*Raphael v. The Governor, etc.*, 17 C. B. [84 Eng. C. L.], 161; *Miller v. Race*, 1 Burr., 462; 1 Smith's Lead. Cas. [7th Am. ed.]; *Spooner v. Holmes*, 102 Mass., 503; *Worcester, etc.*, v. *Dorchester, etc.*, 10 Cush., 488; Smith's Man. Com. Law, 256 [1st Am. ed., 306]; *Anon.*, 1 Salk., 126; *Snow v. Leatham*, 2 C. & P. [12 Eng. C. L.], 314.) The rule of *caveat emptor* does not apply to the holder of a bank bill which has been stolen, unless it be shown he did not take it in good faith and for valuable consideration; his knowledge of suspicious circumstances is immaterial, unless amounting to proof of want of good faith. (*Worcester County Bank v. Dorchester, etc.*, 10 Cush., 488; *Wyer v. Dorchester, etc.*, 11 id., 51.) The jury has found that the defendant took these coupons in good faith, without gross negligence, and as

agent of his employer. He thus acquired a lawful possession of them which was no evidence of a conversion. (*Spooner v. Holmes*, 102 Mass., 507; *Clapp v. Cedar County*, 5 Iowa, 15; *Ring v. Johnson County*, 6 id., 265.) The purchaser is not bound to make a close or critical inspection, though the bonds carry on their face circumstances leading to a suspicion of want of title in the seller. (*Birdsall v. Russell*, 29 N. Y., 220; reversing 1 Robt., 538; *Dutchess Co. Ins. Co. v. Hatchfield*, 4 N. Y. S. C., 158; 1 Hun, 675; 47 How., 330; *Commonwealth v. Emigrant Industrial, etc.*, 98 Mass., 12.) Negligence on the part of the purchaser is not sufficient to prevent his becoming a purchaser in good faith. There must be proof of fraud in fact or actual bad faith. (*Seybel v. National, etc.*, 54 N. Y., 288; *Welch v. Sage*, 47 id., 143; *Magee v. Badger*, 34 id., 247; *Belmont Bank v. Hoge*, 35 id., 65; *Head v. Smith*, 44 How. Pr., 478; *Leavitt v. Dabney*, 7 Robt., 350, 353; *Murray v. Lardner*, 3 Wall., 111; *Bank of Bengal v. McLeod*, 7 Moore P. C., 35; *Bank of Bengal v. Fagan*, id., 61; *Goodman v. Simonds*, 20 How. [U. S.], 366; *Spooner v. Holmes*, 102 Mass., 503; *Hamilton v. Vought*, 34 N. J. Law, 187; *Phelan v. Moss*, 67 Penn. St., 59; 5 Am., 402; see, also, note 5 Am., 266, and cases there cited; 1 Smith's Lead. Cas. [7th Am. ed.], 809, 820.) These coupons were payable at a particular time, the first of April. This being so the payees were entitled to three days' grace. (*Brown v. Newell*, 8 N. Y., 190.) They were clearly promissory notes within our statute. (1 R. S., 768, §§ 1-5; 1 Edm. St., 721; *Woodward v. Genet*, 2 Hilt., 527, and numerous authorities there cited.) So "due A B \$325, payable on demand," is a promissory note, though not negotiable. (*Kimball v. Huntington*, 10 Wend., 675; *Luqueer v. Prosser*, 1 Hill, 356; *Bruce v. Westcott*, 3 Barb., 376.) Should the coupons be held to be promissory notes or I. O. U.'s, the purchaser thereof, on the third day of grace, like the purchaser of such a note or I. O. U., would obtain a valid title as a *bona fide* purchaser. (Edw. on Prom. Notes [1st ed.], 525; *Oathout v. Ballard*, 41 Barb., 33.) A negotiable note is not dishonored in the hands of a *bona fide* holder for value, who takes it without notice of a defect in the consideration, within business hours, on the last day of grace. (*Crosby v. Grant*, 36 N. H., 273, 278.) The days of grace on negotiable notes constitute a part

of the original contract; and the negotiability of the note is as unrestricted, during those days, as before their commencement. (*Savings Bank v. Bates*, 8 Conn., 505, 511, 512; *Hogan v. Cuyler*, 8 Cow., 203; *Bank of Utica v. Wager*, 2 Cow., 166; *Osborne v. Moncure*, 3 Wend., 170; *McGraw v. Walker*, 2 Hilt., 405; *Gerkins v. Tompkins*, 12 Barb., 280.)

BOARDMAN, J. :

If coupons separated from their bonds are in law to be considered as representatives of money, and subject to the same rules as bank bills and other negotiable instruments payable in money to bearer, this judgment is correct. It is no longer to be doubted that a *bona fide* purchaser of government or corporation bonds for the payment of money, negotiable by delivery, will be protected in his title, even against the true owner, if they were purchased in the ordinary course of business. (*Seybel v. Nat. Currency Bank*, 54 N. Y., 288, and cases cited.) I think it is about as well settled that ordinary coupons like those in suit are negotiable promises for the payment of money, after they are detached from the bonds, and are in law treated and regarded as bank bills, currency, or the original bonds. (*Murray v. Lardner*, 2 Wall., 110; *Spooner v. Holmes*, 102 Mass., 503; *Nat. Exch. Bank v. Hartford R. R. Co.*, 8 R. I., 375; *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass., 12; *Clark v. Iowa City*, 20 Wall., 585.) Coupons are substantially a minute repetition of what is contained in more concise terms in the bond. They are attached to the bond to be separated therefrom at the convenience of the holder, and to be thereafter negotiated as money, or the representative of money, by simple delivery. Such is in fact the use made of them. They are purchased by banks and bankers as foreign bank notes or gold are purchased. No reason can be seen why a distinction is justifiable.

The referee has found that plaintiff was a purchaser in good faith, in the usual course of business, for full value, of these coupons, and that he had no notice that the seller was not the owner. The evidence abundantly sustains such findings. This, it seems to me, disposes of the whole case.

There was no error prejudicial to the defendant in the admission

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of the evidence of the manner in which these coupons are treated and considered in commercial circles. The fact proved stood admitted by the pleadings. But upon the face of the instruments, the law declared their character to be just what was testified to. In no way was it possible that such evidence, if illegal, could harm the defendant.

The judgment should be affirmed, with costs.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

TOWN OF PIERREPONT, RESPONDENT, v. WILLIAM D.
LOVELASS AND OTHERS, APPELLANTS.

*Capacity of plaintiff to sue — objection waived if not taken by answer or demurrer —
Bridge maintained by town — damages to — Illegal act — responsibility for, cannot
be avoided by contracting with other parties to do it.*

An objection to the capacity of a plaintiff to maintain an action, if not taken by demurrer or answer, is waived.

When a town acquires by legislative sanction, from a turnpike company, the right to maintain a bridge, such right becomes an easement, the property of the town, and the town may maintain an action to recover damages for injury caused to such bridge.

A person cannot, by contracting with others to do an act of which the natural consequence is unlawful damage to another, shield himself from responsibility therefor.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to recover damages alleged to have been caused by the negligence of the defendants in running saw-logs down the Racket river, whereby the plaintiff's bridge over said river was carried away.

The referee, among other things, found that, on the 10th day of April 1810, by chapter 124 of the Session Laws of that year, the legislature of the State of New York incorporated certain persons by the name of "The President and Directors of the St. Lawrence

Turnpike Road Company." The object of the corporation, as declared by said act, was the making of a turnpike from a point on the State road along the south side of Black river to the town of Malone, Franklin county. The act was amended by chapter 53 of the Laws of 1811, and again by chapter 158 of the Laws of 1812. The road constructed by said corporation was known as the "Russell turnpike," and crossed the Racket river, in the township now known as Pierrepont, near the western line of the town of Parishville. The town of Pierrepont was organized in 1818.

The preamble of chapter 154 of the Laws of 1822, recites that the said corporation, "under their corporate seal, do consent and agree to relinquish all that part of a turnpike road passing through the county of St. Lawrence, * * * and all that part of said turnpike road leading through the county of St. Lawrence is given up to the inhabitants of the several towns in the said county of St. Lawrence for a public highway." And the act provides "that the commissioners of highways of the several towns in said county of St. Lawrence, through which the said turnpike road passes," shall lay the same out into highway districts "and assess and apportion the labor and money on roads and bridges in the same manner as if said turnpike road had been legally laid out by commissioners of highways;" and the second section of that act released the corporation "from all laws relating to that section of said turnpike road within the county of St. Lawrence."

It did not appear by the evidence at what time a bridge was first erected across the Racket river at the point of its intersection with the turnpike road, but for more than forty years previous to the 5th day of May, 1867, a bridge had been maintained at such place by the town, connecting the parts of said highway separated by the river, and forming a part of said highway. During that period the town had constructed at this point four or five different bridges, one of which was built about 1838, one in 1849, one in 1853, and one in 1861. They were all built on the same location, the position of the abutments and piers not having been changed, except that in 1853 the eastern abutment was placed about half its width further down the stream. The latter bridge stood till the 5th day of May, 1867, when it was carried away and destroyed by logs of defendant's being carried down the river and against the

bridge, certain parties being employed under contract with defendant to drive such logs down the river.

On the 10th of April, 1850, the legislature (chap. 264) passed an act declaring the Racket river "a public highway for the purpose of floating logs and lumber from its mouth, in the town of Massena, to the foot of Racket lake, in the county of Hamilton." The act provided no compensation to riparian owners.

Parker & McIntyre, for the appellants.

Sawyer & Russell, for the respondent.

BOARDMAN, J. :

Various reasons are urged why this judgment should be reversed. I will proceed to notice them in their order.

First. It is alleged that the town was not the owner of the bridge destroyed, in such a legal sense as to enable it to maintain this action in the name of the "Town of Pierrepont."

The complaint says plaintiff was the owner of the bridge. The answer contains a general denial. In no other way is the right of plaintiff to maintain this action in its present form questioned. By reference to sections 144 and 148 of the Code, it would seem that any objection to the capacity of plaintiff to maintain this action was waived, inasmuch as the defendants neither demurred nor set up by answer any such defense. (*Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y., 648.) The defendants, having waived any objections to the rights of the plaintiff to maintain this action, are concluded thereby, and if a cause of action has been established by the evidence upon the trial, the plaintiff may recover. (*Seaton v. Davis*, 1 N. Y. S. C., 91; *Wright v. Wright*, 54 N. Y., 437.) Aside from this answer to the objection, the referee has found that the town was the owner of the bridge destroyed, and had capacity to maintain the action. Such conclusion is sustained, I think, by the evidence and the law. The town takes in its name, by virtue of any conveyance of lands within its limits, in any manner for the use or benefit of the inhabitants of such town. (1 R. S. [Edm. ed.], 310, § 3; 2 Wend., 109.) The turnpike company owned this highway and the right to maintain a bridge across the Racket, as a part

of such highway, at the place where this bridge stood. By chapter 154 of the Laws of 1822, it is alleged that the turnpike company released this road to the inhabitants of the town, whereby the town became the owner, not in the ordinary manner, but by succession to the rights of the turnpike company. The fact that the highway was laid out in districts, and was managed by the commissioners of highways, does not affect the question of title in plaintiff. So far as the bridge in question is concerned, it was maintained by the whole town, from taxes levied upon all its inhabitants, as a matter of convenience. In this view it becomes unnecessary to determine whether the commissioners of highways or other town officers can, in ordinary cases, bring such an action as this, or whether it must be brought in the name of the town. The town acquired the right to maintain this bridge of the turnpike company, with the legislative sanction. The right thus acquired becomes an easement, and is the property of the town; and, in my judgment, the referee was correct in holding that the town could maintain the action.

Second. There is no evidence in the case from which we can say, as a conclusion of law, that the plaintiff was guilty of contributory negligence. The referee finds that there was none. The overseer of highways has no care over or duties in respect to bridges. Notice to him was not notice to the town. (*Bush v. Trustees of Geneva*, 3 N. Y. S. C., 409; *Bartlett v. Crozier*, 17 Johns., 439, 447.)

Third. The referee has found that the bridge was properly constructed. This is claimed to be error. If the defendants had no right to run logs down the river as a public highway, they are not in a situation to raise such a question. They would be wrongdoers, and, however defective plaintiff's structure, the defendants would be liable for any injury to it. The plaintiff was only bound to protect its bridge against dangers legally threatening its existence. But the evidence sustains the findings of the referee. The bridge was well constructed, of proper dimensions, and of suitable materials, height and strength. It had proved sufficient for many years. It would be extravagant for the court, upon the evidence, to hold that the bridge was so negligently constructed as to deprive plaintiff of its recovery in this action.

Fourth. After the logs were placed by defendants upon the ice in the river, they employed certain persons to run them down the

river when the spring freshets came, contracting to pay five cents per log for the service. Defendants claim these parties (Snell and Douglass) thereby became contractors and alone liable for any damage done by the negligent or careless running of the logs. What Snell and Douglass agreed to do, was, to run such logs as defendants had or should put into the river. The defendants were to set the logs afloat. After they were afloat, Snell and Douglass were to run them; that is, they and their men were to remain behind to pick up and keep in the channel stranded logs, and break up and forward any jams that might occur. Snell and Douglass were in no proper sense contractors. They were laborers for hire no less than if they had been paid by the day for the work. The payment by the piece secured greater fidelity and industry, but did not change the character of their employment. If, however, Snell and Douglass can be deemed contractors, I do not think the defendants would be relieved of responsibility for their negligence. The act which they were employed to do was unlawful, since, as we shall see, Racket river was not a public highway. (*Congreve v. Smith*, 18 N. Y., 79.) They were employed by defendants to do such act. The dangers arising therefrom were the natural consequences of the thing to be done. It was the duty of the defendants to provide against or prevent such consequences. By simply contracting with others to do the dangerous act, the defendants do not relieve themselves from its consequences. (*Creed v. Hartmann*, 29 N. Y., 591; *Storrs v. City of Utica*, 17 id., 105.) Besides, these defendants put the logs in the river; this was the primary source of the mischief, without which the injury would not have happened. The natural action of the water might, and probably did, produce the injury, independently of the action of Snell and Douglass. The large mass of the 200,000 logs, doubtless was carried down by the force of the current alone. Thus, defendants' conduct led directly, we might say, in view of the result, necessarily to the injury. For such direct act defendants are liable (*Jones v. Chantry*, 4 N. Y. S. C., 63), even though other acts set in motion by them concurred in the result. (*Pollett v. Long*, 56 N. Y., 200.)

Fifth. In the case of *Morgan v. King* (35 N. Y., 454), the court declared the law, making the Racket river a public highway,

unconstitutional, and held upon the facts then before the court, that such river, above Potsdam, was not in fact a public highway, and was not the subject of a public easement. The facts proved in that case, so far as we can judge from the report, were not essentially different from those here given in evidence. Applying the law of that case to the facts before us now, and it is evident that decision is conclusive. But the defendants insist that the town is not a riparian owner, and is not, therefore, in a situation to urge the invalidity of the law, declaring the river a public highway, for want of compensation to owners of the adjacent soil. Such claim is founded on the erroneous assumption that the town had no vested right to use the banks and bed of the river to maintain the bridge. For over forty years the town has maintained such a bridge at the same point. If necessary, a dedication might be presumed, since an easement may be so acquired. But we have already seen that the plaintiff acquired a vested right from the turnpike company in 1822. As a consequence the acts of 1850 and 1851 were void, so far as they affected the plaintiff in the absence of compensation, and the defendants took no rights by said acts as against the plaintiff's prior rights. The findings of the referee in his exhaustive and elaborate report, and the law applicable to the case, make it quite conclusive that the Racket river, at and above the point where this bridge was, is not a public highway, much less a navigable stream.

It is unnecessary to consider in detail the exceptions taken upon the trial. Many of them are sufficiently answered in the previous discussion.

The offer to show that a square headed pier was of an improper form, was properly rejected, because it was an opinion upon a state of facts which any person, however inexperienced, was equally competent to form; it was not a question for experts; and for the further reason that plaintiff's counsel had admitted, as appears by the case, that an "A" shaped pier would "shunt" off logs better than a square end pier. Whatever force could have come from the evidence, had therefore been conceded, and did not require proof.

The offer to show that there was no other existing outlet to market for lumber growing in the valley of the Racket, and that there were large quantities above this bridge, was properly rejected.

It may be that "necessity knows no law," still, necessity does not ordinarily exempt parties from the consequences of their acts. It is not necessary that parties should buy logs or land where there is no means of reaching or removing the timber except by trespassing upon the rights of others. So far as such evidence tended to justify the making of the Racket a public highway, it is answered by the other facts in the case, showing that it is not and cannot be made such under our laws.

The trial of this case has apparently been conducted with great care, labor and skill; the report of the referee bears evidence of his industry and faithfulness in the discharge of his duties; and the result to my mind is just and proper. After a careful consideration of the learned arguments of counsel upon this appeal, I can see no good reason why a new trial should be had. The judgment should be affirmed, with costs.

JAMES, J.:

I concur with Justice BOARDMAN in the result, and in all of his opinion except that portion which holds that the Racket river is not a highway; from that I dissent. I am of the opinion that the reverse is the law, notwithstanding the case of *Morgan v. King* (35 N. Y., 454).

LEARNED, P. J.:

I agree with the result of my brother BOARDMAN's opinion; but I do not think it necessary to pass on the question, whether or not the Racket river is a public highway, so far as concerns the right to float logs.

It is found by the referee that the bridge was of reasonable form and sufficient strength, with reference to any reasonable use of the channel in floating logs and lumber, and that the destruction of the bridge was caused by the negligence of the parties in charge of the drive; that no men were sent ahead to prevent jams. The defendants put the logs in the river, and, by not taking precautions against jams, caused the injury. They were liable for their negligent acts.

Judgment affirmed, with costs.

ELIJAH P. GREENE v. HENRY DEAL, APPELLANT, AND
OTHERS.

*Mortgage—equities between mortgagees—how far subsequent purchaser bound by—
Recording act.*

Two mortgages bearing even date were given respectively to A and B, with the understanding that they were to be equal liens upon the real estate described in them. B's mortgage was first recorded. Subsequently, but after A's mortgage was recorded, B assigned his mortgage to C, and C thereafter assigned it to D; both C and D being ignorant of the understanding that the mortgages were to be equal liens upon the premises. *Held*, that D, being a purchaser in good faith and for a valuable consideration, might avail himself of the earlier recording of his mortgage, and that it was a prior lien to that of A.

Two bonds and mortgages of the same date were executed upon the same property for the purchase-money. One was given to Henry Deal, the other to Mary C. Greene, and each was expressed to be for a part of the purchase-money of the premises. It was intended by the parties that the mortgages should be equal as to priority. They were recorded on the same day; but the former was recorded at a later time than the latter. The mortgagee in the latter mortgage, Mary C. Greene, subsequently, but after the recording of the former mortgage, assigned her mortgage to Elijah P. Greene, and he subsequently assigned it to John K. Warnick. Warnick and Greene were each *bona fide* purchasers, without notice of the agreement that the lien of the mortgages was to be equal as to priority.

A prior mortgage had been foreclosed, and there was a surplus. Warnick claimed a priority in respect to that surplus, and Deal claimed that the two mortgages should share equally. The referee and the Special Term sustained Warnick's claim, and Deal appeals.

M. L. Stover, for the claimant Warnick. The claimant Warnick, being a *bona fide* purchaser of the mortgage to Mary C. Greene, and having no notice of any of the circumstances to defeat the apparent preference of that mortgage, is entitled to protection. (*Corning v. Murray*, 3 Barb., 652.) It is well settled that if one affected with notice convey to another without notice, the latter is as much protected as if no notice had ever existed. (*Jackson v.*

Van Valkenburg, 8 Cow., 264; *Jackson v. Given*, 8 Johns., 137; *Varick v. Briggs*, 6 Paige, 323; *Corning v. Murray*, 3 Barb., 652; *Webster v. Van Steenburg*, 46 id., 212.)

Z. S. Westbrook, for the appellant. The recording acts did not apply, and neither could gain priority by having his or her mortgage first recorded. (*Jones v. Phelps*, 2 Barb. Ch., 440; *Fort v. Burch*, 5 Denio, 184.) And this even if the Greene mortgage was recorded first. (*Fort v. Burch*, 5 Denio, 187; *Jackson v. Post*, 15 Wend., 25; *Van Rensselaer v. Clark*, 17 id., 25.) Deal's mortgage was on record when they took their assignments, showing upon its face that it was equal with the other. And no presumption could arise from the record that one mortgage had priority over the other. And if any presumption arises from the record it must be that the two mortgages stand equal. Hence, these assignees are chargeable with direct notice that the two mortgages stood equal, or they were at least bound as men of ordinary prudence to inquire and ascertain the condition of the two mortgages as to their equality. (4 Kent, 179; *Williamson v. Brown*, 15 N. Y., 354; *Tuttle v. Jackson*, 6 Wend., 226.) Whatever is sufficient to put upon inquiry is equivalent to actual notice.

LEARNED, P. J.:

The question in this case is whether a purchaser in good faith, without notice and for a valuable consideration, of a recorded mortgage, is bound by a verbal agreement between the mortgagee therein and the mortgagee in another mortgage recorded at a later date, on the same premises, that the two should be equal in priority; such agreement having been made at the time of the execution of the mortgages. There was nothing in the mortgage itself, held by Warnick, to give him notice that there was another mortgage on the same premises, of equal priority. The fact that it was described as a purchase-money mortgage, gave no such notice. Even if he had known that there was another purchase-money mortgage, it would not follow that it was intended that the two should be equal in priority. Two purchase-money mortgages of the same premises are some times given, of which one is intended to be the prior lien.

The question then arises as to the effect of the recording act.

Mortgages are conveyances under that act. (1 R. S., [m. p.] 762, § 70 [38].) When Warnick, therefore, bought the mortgage of Greene, he would look to see whether Greene had previously assigned it, and whether it had been assigned to Greene. Finding, as he would, an assignment to Greene from Mary C. Greene, the original mortgagee, he would examine whether she had previously assigned the mortgage. If she had not, then he would examine whether there was any incumbrance recorded prior to the recording of this mortgage; and if there were none on record, he would be entitled, having no actual notice of any prior incumbrance, to assume that none existed which could affect him. (1 R. S., [m. p.] 756, § 1.)

This matter was expressly decided in *Corning v. Murray* (3 Barb., 652), a case almost identical with the present. And it is pointed out in that case, that the matter in dispute is not "within the rule that an assignee of a chose in action takes it subject to the equities existing against it in the hands of the assignor. The only application that has ever been made of this rule, is, that the *original debtor* can make the same defense against the assignee that he could have made against the assignor." (See *Murray v. Lyburn*, 2 Johns. Ch., 441, for the reason of this distinction.)

The case of *Jackson v. Post* (15 Wend., 588), is explained in *Hooker v. Pierce* (2 Hill, 650). It is there said that "the registry of the grantor's deed inures, in the nature of things, to the benefit of all those who claim under him. They become entitled to use all his habiliments of title as their own. His registry is theirs." That is to say, in the present case, Warnick is entitled to the benefit of the recording of the mortgage by Mary C. Greene. Her recording is his. By this construction only, can proper effect be given to section 1, above cited. (See *Croft v. Wood*, 10 S. C. [3 Hun], 571.)

It cannot be that a *bona fide* purchaser, finding the chain of title clear of incumbrances while it was in the successive persons through whom he claims, is required to examine the records for subsequently recorded incumbrances. It is true that the language of the statute is, that the unrecorded conveyance shall be void against any subsequent purchaser in good faith and for a valuable consideration, "whose conveyance shall be first duly recorded."

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ARTICLE XXII.

...expenses.

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ing both the lands contracted to be sold and those unsold, for the foreclosure of which the action was brought by D, a *bona fide* purchaser thereof from C for value, without notice of the existence of the contracts of sale. D did not put on record his assignment for several years after its delivery to him, and during this time, C, assuming to be the owner of the mortgage, executed releases from the lien thereof of a portion of the mortgaged premises which had not been contracted to be sold, and the value of which exceeded the amount due on the mortgage.

In the foreclosure suit, the parties holding contracts of sale claimed that their lands were not liable to sale under the mortgage, by reason of the release of lands primarily liable and equal in value to the amount due on the mortgage, and that the equities which they were entitled to set up as against C, who had taken the mortgage knowing (constructively at least) of such contracts, were equally available against D, his assignee, though a purchaser in good faith without knowledge of their existence.

The referee dismissed the complaint as to the defendants who had contracts of sale. The General Term affirmed the judgment entered on the report of the referee, so far as it related to lands of which the purchasers had, *before the mortgage was given*, actually entered into possession, and reversed it as to those who had not entered into such actual possession, holding (59 Barb., 585; S. C., 5 Lans., 160) that the plaintiff was chargeable with constructive notice of the interests which the purchasers in actual possession of the lands held by them had therein, and on that ground held that their lands were not subject to the lien of the mortgage.

The Commission of Appeals, while affirming this proposition, did not assent to the further view expressed by the court below, that the plaintiff, being a *bona fide* purchaser, was not chargeable with the notice that C had of the rights and equities of the contract purchasers; and DWIGHT, C., in his opinion, says: "It is well settled that an assignee of a mortgage must take it subject to the equities attending the *original transaction*. If the mortgagee cannot himself enforce it, the assignee has no greater rights." Again he says: "A considerable number of authorities are cited by the plaintiff, as tending to show that the assignee of a chose in action is only subject to the equities between the creditor (assignor) and the debtor, and not to the so-called equities of third persons; such cases, as *James v. More* (2 Cowen, 298) and others of the same class, were reviewed as to their principle, or specifically, in *Bush v. Lathrop* (22 N. Y., 535), and repudiated."

These views, though their expression may not have been necessary to the decision in this case, and may be regarded as *obiter dicta*, appear to be in harmony with those of the present Court of Appeals, as laid down in the case of *Schafer v. Reilly* (50 N. Y., 67), in which it was held that a mortgage, executed to an agent of the mortgagor for the purpose of being negotiated, recorded and subsequently negotiated, but before the assignment and delivery of which to the assignee another person acquired a mechanic's lien upon the mortgaged premises, was a charge upon the premises subordinate to the mechanic's lien, and that this was so, notwithstanding the assignee, before taking the assignment, acquired and obtained from the mortgagor an affidavit that the mortgagee advanced the whole

sum of principal secured by the mortgage without abatement, and that there was no offset, defense or counter-claim thereto. Judge ALLEN says in his opinion: "Eminent judges have pronounced in favor of a rule which would only subject the purchaser of choses in action to the equities of the debtors, and which would give them rights as they apparently exist against third persons, but these views have not prevailed." The doctrine laid down in *Schafer v. Reilly*, which was decided upon the authority of *Bush v. Lathrop* (22 N. Y., 535), has been so far qualified by the Court of Appeals, as that a *bona fide* purchaser of a chose in action, not negotiable, from one to whom the owner has transferred the apparent absolute ownership, and who takes upon the faith of such ownership, obtains a valid title as against such owner, although his vendor had not such title. (*Moore v. Metropolitan Nat. Bank*, 55 N. Y., 45, 46.) This qualification, however, rests upon the doctrine of estoppel, which is not applicable to the present case.

In the case of *Hooker v. Pierce* (2 Hill, 650), cited by the court in the present case, the existence of a different state of facts is said to distinguish it from the decision of the case of *Fort v. Burch* (5 Denio, 187), which holds that if a junior mortgagee, with notice, assign to one who has no notice, the assignee is entitled to the preference, provided he record his assignment before the prior mortgage is recorded, but that if he omits to record the assignment, his want of notice will not avail, and from the cases of *Jackson v. Post* (15 Wend., 588); *Van Rensselaer v. Clark* (17 id., 25); *King v. Richardson* (3 Keyes, 450); *Goelet v. McManus* (1 Hun, 306), holding substantially the same doctrine in regard to the effect of the record of a prior deed recorded subsequently to one taken with notice thereof, and before the taking of a conveyance from the grantee thus affected by notice; the case of *Hooker v. Pierce* holding that, while in accordance with the principle laid down in *Jackson v. Post* and the cases which have followed it, a *subsequent* purchaser is bound to notice *prior* conveyances, yet, that, in that case (*Hooker v. Pierce*), the facts did not justify the application of that principle, as the title which was there attempted to be established against the *subsequent* purchaser, was not acquired through a *prior* conveyance.

In the present case it may also be said that, as both mortgages were given at the same time, neither can be said to be subsequent to the other, and therefore the provisions of the recording act did not apply to Deal's mortgage, as they would have done under the decision of *Jackson v. Post*, had it been prior, and not of the same date and time of delivery as that of Warnick, the rule laid down in *Hooker v. Pierce* (2 Hill, 654) only requiring "purchasers to search for registries *subsequent* to their own in order to detect *prior* conveyances," though this construction does not appear to be justified by the words of the recording act.

The views expressed in the opinion in the present case appear, however, to go much further than this, and to be, to a great extent, subversive of the principles laid down in *Jackson v. Post*, even as they are qualified in the decision of *Hooker v. Pierce*, and to give to the recording act a construction, if less literal, more in harmony with its intention and purpose, and one which, affording to innocent purchasers a protection against latent equities, makes it sufficient to search the records against each party who has had title or interest in the premises during the time that the record shows such title or interest to remain in him, instead of requiring a search

to be made against each such person from the time of the acquiring of such title or interest, to the date of the search, although the record may show that he has conveyed away his interest fifty years prior to the time of the search. This decision shows a departure from the technical rule laid down in *Jackson v. Post*, and gives a security to real estate titles, which, under that decision and the views expressed in the cases which have followed it, they were very far from possessing, the general practice of the profession being to search the record against persons who held title to the property only during the time the record showed such title to remain in each, thus leaving the title uninvestigated in particulars in which there was certainly a *possibility* of defects being afterward shown. — [REP.]

JANE C. HAM, RESPONDENT, v. EDMUND H. VAN ORDEN,
APPELLANT.

Statute of frauds — acceptance.

The mere words of a contract for sale of chattels do not constitute an acceptance within the provisions of the statute of frauds. The vendee must act so as to indicate that he receives and accepts the goods.

APPEAL from a judgment of the County Court of Greene county, affirming a judgment of a justice of the peace against defendant.

This is an action for the purchase-price (\$125) of certain furniture. The defense is the statute of frauds. The only question is, whether the goods were accepted and received, so as to take the case out of the statute. The action was tried in a Justice's Court, and the plaintiff recovered. On appeal to the County Court the judgment was affirmed, and the defendant appeals.

The contract for the sale was verbal, and none of the goods were delivered at the time. The defendant had offered \$125 for this furniture, and about a week afterward, at plaintiff's house, she told him he could have it, and he said he would take it. The defendant asked how long it would take to get the things together, and the plaintiff said two or three days. He wondered if he could get Watson, the plaintiff's son, to bring it down; *i. e.*, from her house to his. At a subsequent conversation the defendant said: "Jane, about that furniture — I want you to get Watson to bring it down." The plaintiff testified: "I said I could not produce all the things; that some had been broken and some worn out. He said: 'No matter; you send them on and all will be right.'" Or, as another

witness for the plaintiff testified, the plaintiff said: "How about that furniture? I can't deliver all the articles you bought of me; some are broken, some worn out while ma was living, and some are in the cemetery." He replied: "Yes, Jane, I know all about that; see if you can't trust me; you tell Watson to bring the things down for me; we won't have any trouble about it."

The defendant denied this, and testified that he said he would take the furniture at that price, if she would deliver it in good order and give him notice before it was delivered; that if he had the furniture, she would have to trust the things in his hands, and that he did not ask her to tell Watson to bring the things down for him.

The day following this last conversation, Watson, the plaintiff's son, took the goods down to the defendant's house. The defendant was not at home, and Watson left them. The defendant refused to take them when he found that they had been left.

Jacob I. Werner, for the appellant.

Samuel Hand, for the respondent.

LEARNED, P. J.:

It is well said, in *Shindler v. Houston* (1 N. Y., 261), that "the acts of part payment, of *delivery and acceptance*, mentioned in the statute, are something over and beyond the agreement, of which they are a part performance, and which they assume as already existing." And again, in the same case, "there must be an actual acceptance by the latter [the vendee], with the intent of taking possession as owner." Again, in *Caulkins v. Hellman* (47 N. Y., 449): "Even the receipt of the goods without an acceptance is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required."

What was there in the present case? Only a verbal agreement. The plaintiff claims that the defendant accepted the furniture, because, in the presence of the furniture, he agreed to buy it, and then, that he received it the next day by its delivery to Watson,

alleged to be his agent for that purpose. But the mere words of the contract for sale are not acceptance. Acceptance requires "that the vendee should also *act* [not talk], and that his act should be of such a nature as to indicate that he received and accepted the goods delivered as his property." (*Rodgers v. Phillips*, 40 N. Y., 519, 524.) In the present case the defendant did no act whatever, except to make the contract. Some of the furniture was not even present; some was broken; some was in the cemetery. Even as to the contract actually made, if the matter of fact were before us for review, a fair understanding of the testimony, perhaps, would be, that he was not bound to the price of \$125, if the furniture should prove to be in bad condition. But, however that may be, whatever the mere verbal agreement was, the defendant did no act which can be called an acceptance of the property. It may be that he agreed to accept the furniture. But, as a matter of fact, he did not accept anything. (*Brabin v. Hyde*, 32 N. Y., 519; *Brand v. Focht*, 3 Keyes, 409; *Good v. Curtiss*, 31 How., 4.)

It is said that the acceptance and the receiving may be at different times. (*Cross v. O'Donnell*, 44 N. Y., 661.) Even if this be correct, it cannot be said that, in the present case, there was any acceptance of the goods by the act of Watson. Assuming that the goods were to be delivered to the defendant at the plaintiff's house, yet, as the contract was verbal, it was necessary that he should manifest his acceptance by some act. So that the delivery of the goods by the plaintiff to Watson, that they might be carried to the defendant's house, was not an acceptance by him. And, indeed, the plaintiff does not argue that the delivery to Watson was an acceptance, but that the acceptance had preceded. No such acceptance, as is before said, had in fact taken place, and Watson had no authority from the defendant to accept. The plaintiff should have been nonsuited.

The judgment must be reversed, with costs.

Present—LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgments of County Court and justice reversed, with costs.

THE OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY, APPELLANT, v. THE VERMONT AND CANADA RAILROAD COMPANY AND OTHERS, RESPONDENTS.

Construction of agreement — right of corporation to maintain action for.

Where a railroad corporation, organized under the laws of this State, has leased its road to a foreign corporation for a term of years, and subsequently an action is commenced against it by the attorney-general to have its charter forfeited on the ground that the agreement was illegal, such corporation cannot bring an action against the corporation with which it has contracted, to have this court decide whether or not such contract was *ultra vires*, and, if it be so, to adjudge it entitled to recover possession of its property.

APPEAL from a judgment sustaining demurrers, interposed by the defendants.

The complaint sets forth that the plaintiffs are a railroad corporation under the laws of New York, and the owners of a certain railroad therein; that from their organization until March, 1870, they used said road and performed their duties as owners of the franchise; that in February, 1870, they entered into a written agreement between themselves, as parties of the first part, and the Vermont and Canada Railroad Company, a corporation under the laws of Vermont, and the managers and trustees of the last mentioned railroad under the laws of that State and the decrees of the courts thereof, as parties of the second part, which agreement was executed by the plaintiffs, under their corporate seal, by the order of their board of directors; that the Vermont and Canada Railroad Company is not incorporated under the laws of New York; that it had made default on its bonds, and the other parties of the second part were, at the time of executing the agreement, acting as trustees, managers and receivers of said road, under some decrees of the courts of Vermont unknown to the plaintiffs; that as to the authority of such trustees, managers and receivers to enter into the agreement, the plaintiffs are ignorant; that, at that time, the Vermont and Canada Railroad Company was insolvent, and had little or no property beyond the incumbrances; that the

Central Vermont Railroad Company, one of the defendants, a corporation under the laws of Vermont, claims to have succeeded to the rights of the parties of the second part in said agreement; that in March, 1870, the executive officers of the plaintiffs, in pursuance of orders of the board of directors, and in conformity with said agreement, delivered possession of the plaintiffs' railroad to the said parties of the second part; that John Schrier, one of the defendants, residing in New York, is now superintendent of said railroad, in charge thereof; and that said Central Vermont Railroad Company and said John Schrier, claiming under said parties of the second part, have possession of said railroad.

The plaintiffs further aver, that recently the people of the State of New York, through their attorney-general, have asserted and claimed that the aforesaid agreement was beyond the corporate powers of the plaintiffs; was illegal and void, and subjected the plaintiffs to a forfeiture of their charter; that the people, in 1874, commenced an action against these plaintiffs to declare such forfeiture; that the plaintiffs have kept up their organization; that the amounts payable to the plaintiffs under said agreement have been paid, and that from these moneys they have paid interest on bonds and dividends; that, since the defendants have had possession of said railroad, they have worn out and consumed large portions of the rolling stock, etc., some of which they have replaced; that the plaintiffs claim that that which has thus been supplied by the defendants has become the property of the plaintiffs by substitution.

The agreement, which is set forth at length, is, in substance, a lease of the road by the plaintiffs to the parties of the second part, for twenty years, at a rent of \$386,620 for each year for the first three years, and a larger sum for the succeeding years, payable monthly, besides taxes, and \$15,000 per annum for the expenses of maintaining the organization of the plaintiffs; the parties of the second part to keep up the track and equipment.

The plaintiffs aver that the agreement was made in good faith, and on the belief that it was legal; that, if it be adjudged valid, the pecuniary result is not objectionable to them, and they would be content therewith; that if it be unauthorized, they desire to be relieved therefrom, to the end that they may resume and perform their duties. And they ask a judgment of the court, whether said

agreement be beyond the corporate powers of the plaintiffs, or illegal; and that, if it be adjudged to be beyond such powers or illegal, they may recover possession of the railroad and equipment, together with all new or substituted rolling stock and equipment.

The defendants severally and separately demurred; the defendant Schrier, generally, on the ground that the complaint did not contain facts sufficient to constitute a cause of action; the other defendants on the ground of a want of jurisdiction of the persons of the defendants.

The demurrers were sustained and the defendants had judgment, from which the plaintiffs appeal.

Wm. M. Evarts and L. Hasbrouck, Jr., for the appellant

Edward C. James, for the respondents.

LEARNED, P. J.

The object of this action is to obtain the advice of the court. The plaintiffs do not allege that they have been injured, nor do they ask for redress. They wish to be informed whether a contract which they made was illegal; a matter about which neither they, nor the other party to the contract are alleged to be in doubt.

Executors and trustees are allowed to come into court for the construction of instruments and directions as to their duties. In a like manner, those standing as *cestuis que trust*, have had the same privilege. The general ground on which such actions are permitted, is, that the trustees or executors have, under some instrument, future duties to perform, about which they are in doubt; that there are conflicting claims as to what these duties are; that the duties are imposed on them by the words of some other person; that in their trust capacity, they are entitled to protection in equity. No such circumstances exist in this case. Under this instrument, there is no doubt or misunderstanding as to the plaintiffs' duties. They are simply to receive a sum of money monthly. There are no conflicting claims as to their duties under this instrument. None but the stockholders claim the money which they receive. The language of the instrument is their own, and their duties are not imposed by some other person. And the plaintiffs do not act in a trust capa-

city, entitling them to the protection of equity. The corporation plaintiff is a person. It has its duties undoubtedly, like other persons, but the affairs which it manages are its own.

The case is simply this: Two persons have made a contract of lease, one to the other. A third person has alleged that the lease is illegal. And the lessors ask the court to say whether it is or not. The lessors do not allege its illegality, or ask to have it set aside. On the contrary the lessors aver that they are content. And the lessees are content. There is no controversy for the court to settle. Courts do not sit to lay down principles of law, but to decide controversies. And here is none. And it is not best that courts should lay down principles, except as the result of actual controversy. To take the present case, for illustration. The question we are asked to pass upon, is, whether such a lease is beyond the powers of a corporation: *ultra vires*. Now, both the plaintiffs and the defendants apparently think that it is not; for they acted on that view; and even now they seem to desire a decision in the negative. There is no probability, therefore, that the arguments for the affirmative will be presented with that force which they would have in a real controversy. In fact, it looks much as if this suit were brought only to obtain a *quasi* decision, which might serve as a precedent in the action brought by the people, in which it is distinctly alleged that this lease was *ultra vires*, and worked a forfeiture of the charter.

Furthermore, it may be that, while such a contract is *ultra vires*, and while the State may thereupon allege a forfeiture, yet the contracting party shall not be allowed to set up the invalidity of his own act. Or again, if the contract were beyond the power of the directors, yet, possibly, the approval of the stockholders might be sufficient to affirm it. Or, once more, it might possibly be affirmed by some of the stockholders, while others might disavow it. We do not pass on these points. We suggest them to show the impropriety of our deciding a question presented in this manner. So long as the State does not enforce a forfeiture, why should the plaintiffs raise any question as to the legality of the contract? They made it, and, until somebody objects, they would best observe it. When the State shall attempt by action to enforce such forfeiture, it will be time enough to decide in that action whether

the charter has been forfeited by reason of this lease. When a stockholder shall complain that the directors transgressed their powers in making this lease, it will be time enough to inquire whether he has not ratified their act.

And again: Whenever executors or trustees, or the *cestuis que trust*, come into court for the construction of an instrument, they bring in as parties all who are affected by the conflicting construction. Now, in the present instance, if there be any one who claims that the lease is void, as *ultra vires*, it is the people; yet they cannot be heard in this action.

The plaintiffs have carefully omitted in their complaint any allegation that the lease is illegal, or that they desire to have it set aside. They only allege that, *if it is illegal*, they desire to be relieved therefrom.

It may be said that the plaintiffs, as a railroad corporation, have certain public duties, and therefore ought to be instructed as to the legality of their acts. It is enough to say, that if, before entering into this contract, they had brought an action similar to the present, stating their intention to enter into such a lease, and the threat of the attorney-general that the lease would be *ultra vires*, and their desire that the court should adjudge whether or not such a lease would be valid, no one would have thought that such an action could be sustained. Now they have acted; if legally, it is all right; if illegally, they must, like other persons, take the consequences. Thus far the consequences have contented the plaintiffs and the defendants.

We may see that the view above taken of the nature of this action is correct, if we consider what judgment could be granted on default. (Code, § 275, sub. 1.) The plaintiffs could not have a judgment that the contract was illegal, but only an adjudication whether or not it was illegal; and as none of the parties to the action aver its illegality, the court would be deciding a matter not disputed. It is possible that the plaintiffs are unwilling to aver that the lease was *ultra vires*, lest such an averment should be used to their prejudice in the suit of the people. But, however that may be, such unwillingness shows the absence of all controversy between the parties to this action. They seem to be in complete harmony, which the court ought not to disturb.

This action, then, cannot be maintained. There is nothing before us which calls on us to decide whether or not this contract was *ultra vires*. It is therefore unnecessary to decide the question of jurisdiction. In the general view taken by the Special Term of this matter we concur. In a proper action, brought by the plaintiffs to recover possession of property within this State, to which the non-resident defendants or the foreign corporation claimed some title or interest, we do not understand that the Special Term held that no jurisdiction could be obtained; jurisdiction that is sufficient to enable the court to adjudge possession of the property. In accurate language, there is probably no action now (except in admiralty) which can be called an action *in rem*. But some times the subject of the action is real or personal property in this State. Then the court can obtain a *quasi* jurisdiction of non-residents and of foreign corporations. (Code, § 135, sub. 4.)

The judgment and order appealed from should be affirmed.

Present — LEARNED, P. J., and BOARDMAN, J.

Judgment affirmed, with costs.

JULIA A. C. PARHAN, ADMINISTRATRIX, AND ANOTHER, ADMINISTRATOR, OF HENRY A. CLEVELAND, DECEASED, RESPONDENT, v. JOHN MORAN, APPELLANT.

Letters of administration — effect of — Evidence — Code, § 899.

Where a plaintiff sues as administratrix, her representative character is sufficiently established by the production in evidence of letters of administration, issued in proper form by any officer having jurisdiction.

Where, in an action brought by one to whom letters of administration have been duly issued, the defendant claims that the person alleged to be dead is still alive, he cannot be allowed to testify as to conversations had with the alleged intestate, prior to the issuing of the letters of administration, which conversations tend to show that such person is still living.

APPEAL from a judgment in favor of the plaintiffs, entered upon the report of a referee.

This action was brought to recover moneys collected by the defendant under a power of attorney, given him by Henry A. Cleveland, the plaintiffs' intestate. It was admitted that the defendant, as such attorney of said Cleveland, had received and still had these moneys, and that a demand had been made by the plaintiff prior to the action. Part of the moneys were Cleveland's share of land sold under a judgment in partition in 1867. The plaintiff gave in evidence her petition to the surrogate for the issue of letters of administration, and the letters issued thereon, May 17, 1871. By the petition, it appeared that Cleveland was a sailor, and went to sea in 1858, and that he had not been heard from since.

The defendant was sworn on his own behalf, and offered to show conversations between himself and Cleveland in 1858, in which Cleveland stated his intention of going abroad for a long time; the unfriendly terms on which he was with the plaintiff; and his desire that the defendant should take care of his property. The defendant further offered to show an understanding between Cleveland and his stepmother, in regard to a certain note, for the purpose of showing the feeling between Cleveland and his family when he left the country. The testimony was objected to as incompetent and inadmissible under section 399 of the Code, and was excluded.

The defendant testified, on cross-examination, that he had not seen Cleveland since he left in April or May, 1858, or received any letters from him, and that the moneys received for the account of Cleveland were mingled with his own.

The referee reported in favor of the plaintiff, and the defendant appeals.

Samuel Hand, for the appellant.

John B. Gale, for the respondents.

LEARNED, P. J.:

First. The statute (2 R. S., [m. p.] 80, § 74) declares that letters of administration, granted by any officer having jurisdiction, shall be *conclusive evidence* of the authority of the persons to whom the the same may be granted. This, the revisers said, was declaratory of

existing law. (Notes. See § 2, Phil. Ev. [4th ed.], 77; *Noel v. Wells*, 1 Levinz, 235.) In *Belden v. Meeker* (2 Lans., 470; affirmed 47 N. Y., 307), it was held that "the letters of administration in due form, produced in evidence, are sufficient to establish the representative character in which the plaintiff assumes to sue."

The plaintiff went further, and proved the petition presented to the surrogate. This showed that the deceased at, or immediately previous to, his death, was an inhabitant of Rensselaer county, and it alleged his death. By 2 Revised Statutes (m. p., 73, § 23), these facts gave the surrogate jurisdiction. By the subsequent section (26), the surrogate, before issuing letters of administration, is required to take proof of the fact of death and of intestacy. When he granted letters, therefore, he made a judicial decision, upon proof, of a matter over which he had jurisdiction. This must be conclusive, until reversed or vacated.

Second. But again, the defendant offered himself as a witness to testify to conversations had by him with Cleveland prior to the issue of letters of administration. It was objected that he was inadmissible under section 399 of the Code. The defendant ingeniously answers this objection by saying that the object of his testimony was to prove that Cleveland was yet alive. As the case stood at that point of the trial, Cleveland was proved to be dead. Even assuming (which we do not decide) that in this action the defendant might dispute the fact of Cleveland's death, still the express language of the Code forbade him, a party called in his own behalf, to testify to personal communications between him and Cleveland, against Cleveland's administratrix. There could be no doubt that the plaintiff actually held that character; and therefore the statute protects her from the testimony of the opposing party as to such matters. The only condition which would allow this testimony to be received, is, that it should first be established, otherwise than by the defendant's testimony, that Cleveland was not dead at the time of the trial, if, indeed, the conclusive effect of the letters of administration is open to contradiction. It should be particularly noticed, that the defendant offered no evidence of any communications between himself and Cleveland *subsequent* to the issue of the letters. No such question arises, therefore, as an offer

to show transactions with a living man, at a date after letters of administration had been issued on his estate.

Third. If the matters offered had been admitted, the result could not have been changed. The surrogate had decided (and we must presume on sufficient proof) that Cleveland was dead. In making that decision he was not limited to the evidence given by the petitioner. He was at liberty to take other proof. Whether he did so or not does not appear. Now the defendant offered to prove that, when Cleveland went away, he said that he intended to be gone a long time; that he was on unfriendly terms with his sister; and similar matters which might tend to account for a protracted absence. Suppose that these had been proved. Would they have authorized the referee to hold the letters of administration null? For all that appears, these very facts may have been before the surrogate when he decided. For all that appears, he may have had positive proof of Cleveland's death. It is not here a mere question of presumptions. A tribunal, specially charged with the duty, has decided that Cleveland is dead. This offer is an attempt to have this court come to a different conclusion on the same evidence, or part of the same. And the evidence now offered is quite insufficient. For it is not an offer to show anything which took place after the letters of administration were issued.

Fourth. The defendant further objects that the plaintiff is not entitled to the avails of the land, sold in 1867 under partition, because, as he avers, Cleveland must be presumed to have died in 1865, and the land must be presumed to have descended, then, to his heirs, before the sale.

There seems to be a slight inconsistency in these several positions of the defendant. He urges, first, that Cleveland is now alive, and secondly, that he was dead in 1865. But as the land was partitioned against Cleveland, and as the defendant, Cleveland's attorney, received his share, it does not lie with him to deny that it was Cleveland's money. He is estopped.

In regard to these objections, it may be said, that if the defendant had voluntarily paid the plaintiff, no one would probably doubt that such payment would be good.

It must be that a debtor may safely pay to the administrator, without inquiry as to the actual fact of the death of the alleged

intestate. If this be so, it would seem that all these objections are quite immaterial to the defendant.

The judgment must be affirmed.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed.

HIRAM B. THURBER AND ANOTHER, RESPONDENTS, v. JOHN M. CHAMBERS AND OTHERS, APPELLANTS.

Devise of real estate — charge upon — “Heirs” — effect and meaning of — Code, § 270 — reference — effect of report.

A testator, after having devised certain real estate to his widow for life, remainder to an adopted son and his heirs, directed that certain legacies should be paid, and that one W. should be supported out of his estate for her natural life, and further provided as follows: “The estate hereby devised to H. T. [the son] is charged with the payment of the bequests mentioned in this section of this will, and the same are a mortgage on the estate so devised.”

The son died in the lifetime of the testator, leaving ten children, of whom the plaintiff was one. The plaintiff, after the death of the testator, expended \$3,416.43 in the support of W. The plaintiff, claiming an interest in the land under the will, brought this action to secure a partition thereof, and to have the amount expended by him in the support of W. declared a lien thereon. The land was sold for \$2,282.29. *Held*, that it was immaterial whether or not the devise to plaintiff's father had lapsed, as the money expended by him in the support of W. was a lien thereon and exceeded in amount the value of the land.

The effect and meaning of the word “heirs” considered.

Under section 270 of the Code, the court may, by consent of the parties, order a reference to determine any issue or question of fact, instead of directing the same to be tried by a jury.

When in such cases the referee is directed to report his proofs with his finding, his report has the same effect as the verdict of a jury would have, and the judge is at liberty to form his own conclusions of fact and of law upon the evidence, using the report as merely advisory.

APPEAL from a judgment in an action of partition, directing a sale of the premises and distribution of the proceeds.

Two questions were presented by this appeal: First, whether or not certain real estate formerly owned by one Kelsey T. Thurber, and by him devised to an adopted son, who died during the life-

time of the testator, passed to his children or to the heirs at law of the testator; and, second, whether or not the plaintiff was entitled to charge upon the said land the amount expended by him in supporting one Elsie Whitney, whose support and maintenance was provided for by the will. The clause charging the payment of the legacies, including the support of Elsie Whitney, upon the land, was as follows:

"And I also will and direct that Elsie Whitney, an aged lady who has resided with me for nearly forty years, shall be supported, maintained and provided for out of my estate during her natural life, and the estate hereby devised to Hiram B. B. Thurber is charged with the payment of the bequests mentioned in this section of this will, and the same are a mortgage on the estate so devised to the said Hiram."

On the day of making his will the testator conveyed, by deed, one half of his real estate to his said son H. B. B. Thurber. By an order of the court, dated October 14, 1873, it was referred to Leslie W. Russell to take the proofs upon the issues and report the same with his findings of fact; and also to take and report the proofs on the default as required by the seventy-ninth and eightieth rules. The referee made his report with proofs annexed, dated March 28, 1874. There was no conflict of testimony. The plaintiffs filed exceptions to this report, because, as they claimed, it omitted to find material facts established by the evidence; also, because it found certain facts which were not proven; and also because it contained conclusions of law which the referee was not authorized to make, and which were erroneous. The plaintiffs brought the cause to final hearing upon the report, proofs and exceptions. On this trial the original will was put in evidence. The court gave judgment May 5, 1874, allowing plaintiffs' exceptions and modifying the report accordingly.

Vary & Stone for the appellants. The Special Term had not authority to change the findings of fact made by the referee. The Special Term has not the right to change, modify or reverse the finding of a jury or referee, so as to conform the facts to the opinion which the judge holding such term may entertain of the case. It was not the practice in chancery for the court to reverse or alter

the finding of the facts made by a master. The practice was to refer back to the master to amend his report according to the exceptions as allowed. (*Demott v. Benson*, 4 Edw., 297, 307; *Clark v. Willoughby*, 1 Barb. Ch., 68.) If incorrect in part, it might be recommitted for correction of errors and established as to the residue. (*Callender v. Cosgrove*, 17 Conn., 2.) The most a Court of Chancery would do was to correct mere errors of calculation. (*Utica Ins. Co. v. Lynch*, 2 Barb. Ch., 573.) The devise of real estate to Hiram B. B. Thurber lapsed by the death of said Hiram before the death of testator. At common law all devises lapse by death of the devisee before the testator. (2 Black. Com., 513; *Chrystie v. Phyfe*, 22 Barb., 195; *Campbell v. Rawdon*, 19 id., 499; *Bishop v. Bishop*, 4 Hill, 138; *Van Buren v. Dash*, 30 N. Y., 393.)

Edward C. James for the respondents. The appellants never had any interest whatever in the property in question. At the time this will was made, Hiram B. B. Thurber had ten children living on the adjoining farm. They answered the description of the words "and his heirs," and as such took a vested remainder under this devise. (*Moore v. Littel*, 41 N. Y., 66; *Sheridan v. House*, 4 Abb. Ct. of App. Dec., 218; 4 Keyes, 569; *House v. Jackson*, 50 N. Y., 161, 165; *Campbell v. Rawdon*, 18 id., 412; *Chinn v. Keith*, 4 N. Y. S. C., 126; *Vannorsdall v. Vandeventer*, 51 Barb., 137; *Heard v. Horton*, 1 Denio, 165.) The word "heirs" will be construed "children" whenever that appears to be the intention of the testator. (*Taggart v. Murray*, 53 N. Y., 233, 238; *Bundy v. Bundy*, 38 id., 410, 421; *Kiah v. Grenier*, 56 id., 220; *Prindle v. Beveridge*, 7 Lans., 225.) Even at common law, a devise to "A and his children" vested an estate in them as a class with their father, if he had any children living at the time. (*Wild's Case*, 6 Coke, 17; *Oates v. Jackson*, 2 Strange, 1172; *Ex parte Williams*, 1 Jac. & Walk., 91, note; *Cook v. Cook*, 2 Vern., 545; *In re Sanders*, 4 Paige, 293, 297; *Hannan v. Osborn*, id, 336, 341, etc.; *O'Brien v. Heney*, 2 Edw. Ch., 242, 248, 249.) It is quite immaterial in this case, whether the estate in remainder in the Kelsey T. Thurber half, passed to the heirs of the adopted son or to the heirs of the testator, for it is expressly charged with the

money legacies, and mortgaged for the support of Elsie Whitney, and these claims amount to nearly double the sum which it produced on the sale. There is nothing left for the owners of the fee. The support of Elsie Whitney is charged upon the estate devised, and not on the devisee; upon the remainder, and not on the life estate; and it, together with the legacies, is declared to be a mortgage on such estate in remainder. (*Godard v. Pomeroy*, 36 Barb., 546; *Birdsall v. Hewlett*, 1 Paige, 32; *Hogeboom v. Hall*, 24 Wend., 146.) "An equitable mortgage may be created by any writing from which the intention to create it may be shown." (*Chase v. Peck*, 21 N. Y., 581, 583.) The obligation to pay it is imposed by statute upon the devisee or heir, and not on the personal representatives. (1 R. S., 749, § 4.) If the devise did not lapse the plaintiff is entitled to pay on the principle of contribution. (*Stevens v. Cooper*, 1 Johns. Ch., 425, 430; *Cheesebrough v. Millard*, id., 400.) But if the devise lapsed, equity does not allow the heirs to take the land and defraud the plaintiff of all compensation. In such case the party who has paid the mortgage is entitled to enforce the lien, on the principle of equitable assignment or subrogation. (1 H. & W. Lead. Cas. in Eq. [3d ed.], 152-156; 2 id., 230, 231; *Matthews v. Aiken*, 1 N. Y., 595, 600, 604, 605; *Carter v. Jones*, 5 Wend., 193; *Croft v. Poole*, 9 Watta, 451, 455.)

LEARNED, P. J.:

Kelsey T. Thurber, in 1850, made his will. 1st. He gave his personal estate to his wife. 2d. He gave her a life estate in his land. 3d. He gave as follows: "At the decease of my said wife I give, devise and bequeath to my adopted son Hiram B. B. Thurber and his heirs, all the real estate of which I may die seized, so that at my wife's death he and his heirs shall be seized thereof in fee." 4th. He gave some small legacies, and charged them and the support of Elsie Whitney on "the estate hereby devised to Hiram B. B. Thurber." 5th. In case he should survive his wife, he gave all his estate, real and personal, "to my said adopted son Hiram B. B. Thurber and his heirs," subject to said charges.

Hiram B. B. Thurber died in 1851, leaving ten children, of whom plaintiff is one. Kelsey T. Thurber died in 1857. His

heirs at law are the descendants of four sisters, who are parties to this action. Hiram B. B. Thurber was no blood relation to Kelsey T. Thurber.

The heirs at law of Kelsey T. Thurber claim that the devise to Hiram B. B. Thurber lapsed by his death before the testator. The plaintiff claims that it did not. The Special Term held that the words, "and his heirs," meant "and his children;" that they were intended to designate the ten children of Hiram B. B. Thurber, then living, and to vest an estate in them as a class with their father. And the Special Term held the devise did not lapse by the death of Hiram B. B. Thurber, but that it vested in his children, and that the heirs of the testator took nothing.

There is no evidence what children of Hiram B. B. Thurber were living when the will was executed. One of his children died before the testator. Hiram B. B. Thurber was not a descendant of the testator. There is no question, then, that the devise was not prevented from lapsing by the statute. (2 R. S., [m. p.] 66, § 47; *Van Beuren v. Dash*, 30 N. Y., 393.)

The common mode of expressing a devise, or a grant in fee, whether it be a fee simple, or a fee in remainder, is to devise or grant to A and his heirs. It was by statute that the use of the word "heirs" became unnecessary. (1 R. S., [m. p.] 748, § 1; *Vanderzee v. Vanderzee*, 36 N. Y., 231.)

If Hiram B. B. Thurber had survived the testator, it does not seem to me that any one would have doubted that he took a fee in remainder after the widow. In the case of his thus surviving, it would have been, as I think, impossible to hold that he and his ten children took an estate in common in the remainder. It is true that in this view of the case, the words, "and his heirs," are surplusage. But the experience of every lawyer tells him that their use is more common than their disuse, when a fee is to be devised or conveyed. And this is especially true when the draughtsman's experience goes back of the Revised Statutes. There are cases in which a testator has plainly used the word "heirs" with the meaning of children. But they are cases very different from the present.

In *Bundy v. Bundy* (38 N. Y., 410), the devise was to C, "and in case the said C should die without heirs," then to certain persons. And the question was, whether the testator probably meant

lineal heirs, or collateral as well as lineal. And it was held that he meant lineal heirs or descendants. And the reason given was, that, in another similar clause in the will, the devise over was to the collateral heirs of the devisee; and they could not therefore have been intended by the words, "die without heirs."

In *Vannorsdall v. Van Deventer* (51 Barb., 137), a testator devised "to the legal heirs of A, deceased," and, in a subsequent clause, "to the heirs of V. D." V. D. was living, and it was held that the devise was to his children.

In *Taggart v. Murray* (53 N. Y., 233), the devise was to C, and at her death to pass to her heirs, and if "she leaves no heirs," to be disposed of by her will. It was held that heirs meant issue. It was not to be supposed that the devisee's power over the property depended on the remote contingency of the extinction of heritable blood.

This is not a case which is aided by the abolishment of the rule in Shelley's case. (1 R. S., [m. p.] 725, § 28.) It cannot be claimed that (after the life estate of the widow), a life estate was given to Hiram B. B. Thurber, and the remainder to his heirs. There is nothing to indicate this. And, indeed, the Special Term did not take that view, but held the devise to be to Hiram B. B. Thurber and his children, as tenants in common. It seems to me that such an intention, by which Hiram B. B. Thurber and each of his children were to have one twenty-second part of a farm of about 170 acres, could not have been in the mind of Kelsey T. Thurber. It would have been so strange a disposition of the land, that, if it had been adopted by him, he would have expressed it unmistakably.

But I do not think that this question is material in the disposition of this case. The property has been sold. The avails of the half of the real estate which passed by the will are only \$2,282.29. It is found by the referee that the value of the support of Elsie Whitney was \$3,416.43. The plaintiff supported her; and her support was a charge on the land; and, on a fair construction, it was a charge on the remainder, after the estate of the widow. I think he is equitably entitled to be paid from the avails, as a *quasi* assignee of Elsie. There remains nothing therefore for the appellants.

An important question of practice has arisen in this case. The action is for partition, and for the enforcement of the equitable claim of the plaintiff to be repaid for his support of Elsie Whitney. Partition was equally an equity, as a common-law proceeding (2 R. S., [m. p.] 329, § 93, from the Laws of 1813); and the claim to enforce the plaintiff's lien was properly equitable. Issues therefore were triable by the court, and the parties had no right to a jury trial. (Code, 254; *McCarty v. Edwards*, 24 How., 236.) In this present case there were some issues, perhaps not very important, and some defendants, absentees, were in default. The proper course, therefore, as to the absent defendants, was a reference under Rules 79 and 80. As to the issues, by consent of parties, the referee was to take proof of the respective parties, and to report with his findings of fact.

By reference to section 254, it will be seen that, in equity cases, the court may order the issue, or any question of fact, to be tried by a jury. This is a practice corresponding to the old feigned issue in chancery. Or the court may refer, as provided in sections 270, 271. Section 271 provides for compulsory references, where an account is involved, and is not of general application. Section 270 provides for references by consent. Therefore, in an equity action, the court, by consent of parties, instead of the feigned issue to be tried by a jury, may order a reference. It is a reasonable construction then, that the effect of the referee's report in such a case—that is, where he is to report the proof with his findings, in an equity action—should be substantially the same with that of a verdict of a jury in a similar action.

What, then, was the effect of a verdict, on a feigned issue out of chancery? It was simply to assist the chancellor's conscience. "The jury and the verdict are things which the court may use or let alone as it sees good." (*Lansing v. Russell*, 2 N. Y., 563; *Marvin v. Marvin*, 4 Keyes, 9; *Armstrong v. Armstrong*, 3 My. & K., 45.)

In the present case, therefore, although it may not have been strictly right to "strike out" a part of the referee's report, yet I think that the judge at the Special Term was authorized to form his own conclusions of fact and of law upon the evidence, using the referee's report as only advisory. (*Moore v. Metrop. Bank*, 55

N. Y., 41; *Brinkley v. Brinkley*, 56 id., 192.) And the appeal to the court comes up from the conclusions of fact and of law found by the judge at Special Term, and not from the referee's report.

The judgment should be affirmed.

Present — LEARNED, P. J., and BOARDMAN, J.

Judgment affirmed, with costs.

JACOB CLEARWATER, JR., PLAINTIFF, v. CYRENIUS F. BRILL, DEFENDANT.

Execution — when constable bound to execute it — Proof of judgment not required in action for wrongful taking of goods levied on.

A constable, having an execution valid on its face, and issuing from a competent authority, is bound to execute it, even if he have knowledge of facts rendering the execution void.

A constable, being in actual possession of goods by virtue of executions valid on their face, is not bound, in order to maintain an action against a stranger for taking the goods, to prove the judgment. Proof of the execution is sufficient.

Hart v. Camp (16 Wend., 562) explained.

THIS case came before the General Term, under an order made at the Ulster Circuit, directing a verdict for the plaintiff, subject to the opinion of this court. The action was for the wrongful taking from the plaintiff, a constable, certain personal property, held by him under certain executions issued by a justice of the peace against one Dolson. The defendant, the sheriff of Ulster county, avers that he took the same by virtue of an attachment in the Supreme Court against the same Dolson. On the trial the plaintiff gave in evidence five executions against Dolson, issued by a justice of the peace, and also proved the taking of the property by the defendant, and rested. The defendant gave in evidence the attachment issued in the Supreme Court against Dolson, and the plaintiff gave in evidence the affidavits on which it was obtained, to show its invalidity. The defendant also gave in evidence the affidavits and proceedings and judgments under which the executions in the Justice's Court

were issued, in order to show the invalidity of the executions. It was admitted that the defendant took the property by virtue of the attachment. There was no dispute as to value, and, as the case presented only questions of law, the court directed a verdict for the plaintiff, subject to the opinion of the court at General Term.

F. L. Westbrook, for the plaintiff. The motion for nonsuit was properly denied. The plaintiff, having not only levied on the property, but having taken and being in the actual possession of it, was not required, in order to maintain this action, to prove a valid judgment. (*Baker v. Miller*, 6 Johns., 195; *Spoor v. Harlow*, 8 Wend., 445; *Earl v. Camp*, 16 id., 569; *Johnson v. Curnley*, 6 Seld., 577, 578.) The justice was sufficiently satisfied of the facts to issue his warrant, and third parties cannot attack it collaterally. (*Bascom v. Smith*, 31 N. Y., 605; *Van Alstyne v. Erwine*, 1 Kern., 340; *Reinmiller v. Skidmore*, 7 Lans., 164.) Besides, the defendant was a stranger to those proceedings, and therefore cannot question their validity. (*Moore v. Graves*, 3 N. H., 413; *Isham v. Ketcham*, 46 Barb., 43; *Van Arsdale v. Krom*, 9 Mo., 397.) The rule is well settled that property, having been taken into possession by one officer, by levy under attachment or execution, cannot be taken from him by another officer under another attachment or execution, and such second taking is void, and subjects such second officer to suit for value of property at instance of the the officer who made first levy. (*Freeman v. Howe*, 24 How. [U. S.], 450; *Moore v. Graves*, 3 N. H., 414; *Vinton v. Bradford*, 13 Mass., 114; *Robinson v. Ensign*, 6 Gray, 300; *Thompson v. March*, 14 Mass., 269; *Benson v. Berry*, 55 Barb., 620.) The defendant's remedy, or that of Freer and Hasbrouck, whom he represented, was not by levy on property already in legal custody and taking it out of such custody, but by action to remove the alleged illegal or inequitable obstruction in the way of his levying on and selling the property in question, or to reach its proceeds if it had been sold. (*McElwain v. Willis*, 9 Wend., 548, 561; *Bank v. Dakin*, 51 N. Y., 519; *Crippen v. Hudson*, 3 Kern., 166; *McCartney v. Bostwick*, 32 N. Y., 59; Code, § 232; *Kelly v. Lane*, 42 Barb., 607; 2 R. S. [Edm. ed.], 4, 5, § 8.)

M. Schoonmaker, for the defendant.

LEARNED, P. J.:

It is important to notice that, at the time of the alleged wrongful taking of this property by the defendant, the plaintiff had actual possession of it, by virtue of five executions, each of which was valid on its face. Whatever may have been the irregularity or imperfection of the proceedings before the justice, the constable, having these executions, valid on their face, and issuing from a competent authority, was bound to execute them, and to take the property of Dolson (*Savacool v. Boughton*, 5 Wend., 170), even if he had known the facts alleged to render the proceedings void. (*People v. Warren*, 5 Hill, 440.) Being thus in the actual possession, by virtue of executions valid on their face, the plaintiff, in order to maintain an action against a stranger for taking the goods, was not obliged to prove the judgment. Proof of the execution was sufficient. (*Spoor v. Holland*, 8 Wend., 445.) And, therefore, as against a stranger who takes the goods from the constable's actual possession, the validity of the judgment is not necessary to the action. (*Barker v. Miller*, 6 Johns., 195; *Blackley v. Sheldon*, 7 id., 32; *Coon v. Congden*, 12 Wend., 496).

This matter is examined in the case of *Earl v. Camp* (16 Wend., 562). In that case it is said, in general words, that the rule protecting an officer who acts under an execution valid on its face, is one of protection merely; that he is not to be sustained and protected in whatever actions he may bring. But it will be found, upon an examination of that case, that no actual possession was taken by the plaintiff. "He seems to have rested his title on his own return to void process." The ground of the action seems to have been the alleged lien, acquired by the process in the hands of the officer; and the court says: "I am aware, all this time, that the case might have been differed, by showing an actual prior possession in the plaintiff." So that nothing therein decided affects the force of the rule above stated, which is also laid down in *Parker v. Walrod* (16 Wend., 514).

If, then, the plaintiff, by virtue of these executions, was bound to levy on property of Dolson, and to take the same into his possession, it seems to follow that, when he has done this, and is in actual possession, he may maintain an action against any one who takes the property from him, unless such person shows a better

title. In order then for the plaintiff in the first place to show a right to recover, it was not necessary for him to prove the proceedings before the justice and the judgment. The question then arises, does the defendant stand in such a position that he is entitled, as against the plaintiff, to show that the proceedings before the justice were void for the insufficiency of the papers? It is not pretended that these proceedings were fraudulent as against other creditors. There is nothing to show that they were not taken in good faith. Dolson, against whom the proceedings were had, makes no complaint. If he does not, why should the defendant?

In *Isham v. Ketchum* (46 Barb., 43), it was held by the General Term, that a subsequent attachment creditor could not move to set aside a prior attachment on the ground that it was irregularly issued; and the reason given is, that "if the defendant in the action choose to waive such irregularity, and thus in effect secure the payment of the debts on which the first actions were brought, what had the plaintiff in the last two actions to do with that."

It is true that in that case the attachments spoken of were issued under the Code in an action. Therefore the court speak of the attachments being *irregular*, and not of their being *void*. But the general principle is affirmed, that the subsequent attaching creditor cannot take advantage of defects which would be fatal as against the debtor. So in *Bascom v. Smith* (31 N. Y., 595), in speaking of an affidavit in a case similar to the present, an affidavit plainly insufficient, the court say: "As against third parties the affidavit is sufficient to sustain the jurisdiction of the justice." By this qualification it is implied that an affidavit which would not give jurisdiction as against the defendant in the proceedings, may be sufficient as against others. In *Clapp v. Graves* (26 N. Y., 418) there is an attempt to distinguish between an irregularity and a nullity; and it is said that if the party can waive the objection, it amounts to an irregularity; if he cannot, it is a nullity. There would be no doubt that if Dolson had appeared on the return day of the attachment and answered without objection, he would have waived the defect. (*Stevens v. Benton*, 2 Lans., 156; *Malone v. Clark*, 2 Hill, 657.) In this view of the case there is nothing to conflict with the doctrine, that, on a question as to the title of the

property in question, between a purchaser at the constable's sale and Dolson himself, the sufficiency of the affidavits to give jurisdiction might be raised. The difference between that case and the present is, that the defendant here is not authorized to put himself in Dolson's place, and to say that the defects in the affidavits shall not be waived. He does not represent Dolson, but other creditors of Dolson.

The case of *Rinchev v. Stryker* (28 N. Y., 45) is not in conflict with these views. That only holds that a sheriff, who has attached goods, may show that the title of a plaintiff, claiming by assignment from the defendant in the attachment, is fraudulent as against the attaching creditor. That decision belongs to an entirely different class of cases from the present.

There is another point in this case, and that is, that, inasmuch as the property was in the hands of an officer by levy under execution, no other officer has a right to take it away, although he may levy. (*Benson v. Berry*, 55 Barb., 620; *Freeman v. Howe*, 24 How. [U. S.], 450; *Peck v. Jenness*, 7 id., 624.) This seems to be a wise principle to prevent confusion or unseemly strife. But without passing on this point, we prefer to rest our decision on the other ground, that the defendant, as an officer with attachments against Dolson, had not a right to show, as against the plaintiff, who was in actual possession of the goods by virtue of executions against Dolson, that the affidavits on which the proceedings were based were defective, although the defect was such that Dolson might claim that the proceedings were void.

The plaintiff must have judgment on the verdict.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment ordered for plaintiff on the verdict, with costs.

SARAH C. HAYES, RESPONDENT, v. MICHAEL PHELAN,
APPELLANT.

Laws of 1878, chap. 646 — when action lies under, against vendor of intoxicating liquor.

A complaint, alleging that the death of plaintiff's husband was caused by intoxication, caused by liquors sold to him by defendant, and that by his death plaintiff had sustained damages, in being deprived of the companionship of her husband and of the customary support and maintenance of herself and children, does not state a cause of action under chapter 646 of the Laws of 1878.

The meaning of the statute is to throw the responsibility for injurious acts of an intoxicated person on the vendor or giver of the intoxicating liquor, but not to make him liable for all results arising from the sale or gift of the liquor.

A right of action exists against the vendor or giver of the liquor only in cases where it lies also against the intoxicated person.

A statute should receive a strict construction, which imposes a liability for injuries indirectly, if at all, occasioned by an act which is not forbidden by law.

APPEAL from an order overruling a demurrer to the complaint.

A. Schoonmaker, Jr., for the appellant. It is a fundamental rule of law that no person is liable in damages for the necessary or natural consequences of a lawful act. (*Radcliff's Executors v. Mayor, etc.*, 4 Comst., 185; *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y., 42, 47; *Selden v. Del. and Hud. Canal Co.*, 29 id., 634, 642; *Keltinger v. Forty-second St. R. R. Co.*, 50 id., 206, 210; *Townsend v. N. Y. C. R. R. Co.*, 56 id., 295.) There is no allegation that the earnings of the deceased were applied by him to the support of his wife, nor that the plaintiff had any title to such earnings, nor that if plaintiff had lived he would have earned anything, or that such conjectural earnings would have belonged to the wife, or have been applied to her support; nor is the amount or nature of his earnings anywhere alleged. (*Schneider v. Hosier*, 21 Ohio, 98.) The complaint does not show where the sale of liquor was made; whether in the State of New York or out of it. This is a jurisdictional fact and must affirmatively appear. (*Beach v. Bay State Co.*, 30 Barb., 433; *Whitfield v. Panama R. R. Co.*, 23 N. Y., 465.) The act does not contemplate nor create a cause of action founded on the death of any of the persons named therein. The

act is in derogation of the common law, and must be strictly construed. (*Freese v. Tripp*, Chic. Leg. News, Aug. 1, 1874; cited 5 N. Y. S. C., 105.) The damages claimed as the result of plaintiff's husband's death are of two kinds: 1. Loss of companionship and society, and the grief and distress of mind thus produced. 2. Loss of means of support. The first class of damages finds no sort of warrant in the statute, and has been adjudged not to be recoverable in the Illinois case, before cited, of *Freese v. Tripp*. The second class — "means of support" — the statute provides for. What is meant by this phrase? The plaintiff says, the earnings of the husband, and must maintain that proposition. In Ohio such a loose construction has been approved. (*Schneider v. Hosier*, 21 Ohio, 98.) But in the State of New York no such transcendental and socialistic construction can be sanctioned. The act cannot be presumed to contemplate damages under this description, which have no foundation in common sense or in law. By "means of support" the act can only refer to something which belongs to the party thus injured, or to which he is entitled by law; which he can control and sue for in an ordinary action. The husband's earnings do not belong to the wife in any legal sense. (*Kilburn v. Coe*, 48 How. Pr., 144-147; 3 R. S. [5th ed.], 746, § 1; *Nash v. Russell*, 5 Barb., 556.) The fact that under certain circumstances the husband may be compelled to support his wife does not help the case. That gives her no title to his property. (*Tilley v. The Hud. R. R. Co.*, 24 N. Y., 471.)

M. Schoonmaker, for the respondent. The relation of wife; the dependence upon her husband for support; the sale of liquor by defendant; intoxication caused thereby; death caused by such intoxication, and injury to her means of support resulting therefrom, are all alleged and plainly stated in the complaint. Such statement covers all the grounds specified in the statute as necessary for the maintenance of the action. It is not necessary that the sale of liquor should be alleged in the complaint to be an illegal sale. (*Baker v. Pope*, 5 N. Y. S. C., 103.) The statute is applicable, and the right of action thereunder accrues to the wife in a case such as this, where death is the result of the intoxication, and is not confined to cases where an injury has been received not producing

death. The statute makes no such restriction; the cause of action is given for the damages sustained by reason of the intoxication. The statute expressly provides and sets up the deprivation of support and maintenance as a cause of action in behalf of the wife, and we allege such injury.

LEARNED, P. J. :

The substance of the complaint is, that Andrew B. Hayes, the plaintiff's husband, died early in the morning of July 5, 1874; that he was intoxicated in the evening and night of July fourth; that his death "was occasioned or caused in whole or in part by such intoxication;" that the defendant, by the sale and delivery to said Hayes, on the evening or night of July fourth, of intoxicating liquors, caused, in whole or in part, such intoxication; that by means of such death plaintiff has sustained damages, in being deprived of the companionship of her husband, and of the customary support and maintenance of herself and children.

This is a statutory action, under Laws of 1873, chapter 646. No injury to person or property is alleged. No injury *by* an intoxicated person is alleged. Deprivation of companionship is not by the statute a ground of action. The claim here must be that, by the death of the husband, a wife is "injured in means of support." Condensing the language of the statute (as it is claimed to be applicable to this case), we have: Every person who shall be injured in means of support, in consequence of the intoxication of any person, shall have a right of action against any person who shall, by selling or giving away intoxicating liquors, cause the intoxication, in whole or in part, of such person. The statute has been held by this court to be constitutional. (*Baker v. Pope*, 5 N. Y. S. C., 102.) It does not make the liability to depend on the unlawfulness of the sale. And no statute has declared giving away liquor to be unlawful. It follows, therefore, that, by this statute, the man who has done a lawful act, is required to pay damages for injuries which are not even caused thereby. This peculiarity is still more striking, in that the owner of the building in which the liquor is sold, is made liable for these injuries. It may at least be said that this statute is in derogation of common law, and should be construed strictly. Any statute should receive a strict construction. which imposes a liability for injuries indirectly,

if at all, occasioned by an act which is not forbidden by law. The question here is not whether a cause of action, arising during the life of the husband, would be lost by his death. The death is the alleged injury. No previous loss of means of support is alleged. None could have occurred. The complaint says, "that by means of such *death*, etc., this plaintiff hath sustained," etc. We have a statutory provision, giving a right of action in the case of death by wrongful act. (Laws 1847, chap. 256.) That act and the amendments thereto provide who shall have such right of action, and its extent, and for whose benefit. That action must be brought by the personal representatives, and must be based on a wrong committed. If the present action will lie, three more like it (one for each child) may be brought; there is no limit to the amount of recovery; and the defendant is liable, although he has done nothing unlawful. It should need unmistakable language in the statute to justify this result. The statute says that every person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication of any person, shall, etc. Now, certainly, to be injured in person by an intoxicated person, or in consequence of the intoxication of any person, implies that a wrongful act is done to the party suffering the injury. So, too, injury in property implies that a wrongful act is done in respect to the property. Mere loss of property, unaccompanied by any wrongful act, cannot come under the head of injury. One who can be said to be injured in person or property by an intoxicated person, must then be one who has a right of action therefor against such intoxicated person. So, too, one who is injured in person or property, in consequence of the intoxication of a person, must be one who has a right of action therefor against such person. Otherwise, the loss sustained would be what is called *damnum absque injuria*. The same meaning, too, must apply to the expression, injured in means of support by an intoxicated person, or in consequence of the intoxication of a person. That is to say, one who can be said to be injured in means of support by an intoxicated person, is one who has a right of action against such person for such injury. And one who is injured in means of support, in consequence of the intoxication of a person, is one who has a right of action therefor against such person.

What then is the meaning of the statute? This: It is intended to throw the responsibility for injurious acts back to what is considered to be the original cause. It seeks to make the vendor or giver responsible for the injurious acts of the intoxicated person. In other words, the remote cause, that is, the vendor or the giver, is declared to be liable to make compensation for injuries, for which, previously, the proximate cause only, that is, the intoxicated person, was responsible. The statute was not intended to make those acts "injuries," which had previously not been such, but it intended to fasten the responsibility for these injuries on the vendor or giver of the liquor, instead of leaving it solely on the intoxicated man.

Thus, the *kind* of acts for which a right of action exists is not increased. Only there is an increase of the persons against whom the actions may be brought. Therefore, the statute, without specifying in detail for what acts of an intoxicated person, or for what acts done in consequence of intoxication, the vendor or giver is liable, says that when a person is "*injured*" (meaning by this when he has suffered a wrongful act, or one for which he might have maintained an action against the doer), then the sufferer may go back of the doer of the act, and may seek redress from the vendor whose sale of liquor was the remote cause. If this be not the correct meaning of the statute — if the phrase, injured in person or property or means of support is not to be construed to mean such loss as, aside from the statute, is caused by wrongful acts — then the statute is utterly vague. This construction appears to be in harmony with the ideas which led to the passage of the statute. It was seen that intoxicated men often committed great wrongs for which they were utterly unable pecuniarily to respond, and that great injury was often occasioned in consequence of their intoxication, which they could not make good in damages. And it was thought reasonable that the vendor who sold, as well as the drunkard who drank, should be liable to an action for what were "injuries" in the legal sense. We take, then, the word "*injured*" to imply a wrong, in the legal sense of the word, done by the intoxicated person, or done in consequence of intoxication; and in that sense this plaintiff has not been injured. "The parent cannot, at common law, recover for the loss of the services of his child, nor the wife or child for the loss of the care, support and nurture of

the husband or father, where the death has been brought about by the act of another, whether negligent or willful." *Green v. Hudson R. R. Co.* (2 Keyes, 294; S. C., 28 Barb., 9), where the court say: "The mere death of a human being cannot be complained of as a civil injury, to be compensated in damages." If, then, the plaintiff's husband, being sober, had been killed by a person who was intoxicated, the plaintiff would have had no right of action for such death against that intoxicated person. Would it be reasonable to construe the statute that, although she had no right of action against the intoxicated person for the loss, yet she has such an action against the vendor who sold the liquor which remotely caused the loss? The death of the plaintiff's husband was not, therefore, a civil injury. And this statute makes the vendor and giver of liquor liable only for civil injuries caused, or supposed to be caused, remotely by the sale or giving away by them of liquors.

It is not, probably, necessary to pass on the question, whether in any case the wages of a husband can be said to be the wife's means of support, in the sense that they belong to her, and that a diminution thereof gives her a right of action. That view was taken in *Schneider v. Hosier* (21 Ohio St., 98), where the court held that, as the husband was morally and legally bound to support his wife, she had a pecuniary interest in his resources. That reasoning, if carried out consistently, would seem to result in the doctrine that the wife had an interest in the property of the husband, so that she could maintain an action for injury to his property. For he is bound to support her as much out of his property as out of his wages. It would seem also to result in the further doctrine that a *creditor* was injured in "means of support" by the intoxication of a debtor. For the debtor is as much legally and morally bound to pay his creditor as to support his wife. But, without passing on that question, for the reasons given above, the demurrer should be sustained.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Order overruling demurrer reversed, with ten dollars costs, and demurrer sustained, with leave to plaintiff to amend on usual terms.

GEORGE C. CHIPMAN AND OTHERS, APPELLANTS, v. CHARLES C. MONTGOMERY, SURVIVING ADMINISTRATOR, ETC., AND OTHERS, RESPONDENTS.

Construction of will—who cannot maintain action for—Executor—when chargeable as trustee of personal estate.

A mere pecuniary legatee cannot maintain an action to obtain a judicial construction of a will. He should sue for his legacy, or take proceedings before the surrogate to compel the payment of it.

An heir at law or devisee, claiming a mere legal estate, cannot come into a court of equity to ask a construction of a will. He should bring ejectment.

If, in any case, an action to obtain a judicial construction of a will can be maintained by one entitled as distributee, against an executor holding personal property, on the ground that the same is held by him in trust for the persons to whom it is bequeathed by the will, and, so far as these bequests are invalid, for the distributees, under the statute, it must be alleged in the complaint and proved upon the trial that the executor has in his possession, when the action is brought, personal property held upon such trusts.

APPEAL from a judgment dismissing the complaint herein, entered upon the trial of this action at the Special Term.

This is an action brought to obtain a judicial construction of the will, or wills, of John S. Chipman, deceased. The plaintiffs are some of his heirs at law and next of kin. Some of the plaintiffs are also legatees under the will or wills. The plaintiffs aver that they are in doubt as to the true construction of the wills, and as to the validity of the bequests and devises, and as to the rights of the parties. They pray a judicial construction, and an accounting, and, pending the action, an injunction.

John S. Chipman duly made a will, dated December 28, 1854, and another, dated September 14, 1860. Each of these disposed of the whole of his property. In the general scope, that is, except a modification as to legacies and the use of the word "heirs" in one place in the second will, the two wills are the same. A codicil to the latter modifies a legacy. The testator died September 10, 1862. The wills and codicil were proved October 22, 1860.

By the first will several of the plaintiffs had pecuniary legacies given to them severally. By the second, legacies were given to these plaintiffs, of amounts different from those in the former will.

One legacy was omitted, and a pecuniary legacy was given to another of the plaintiffs. The executrix, in two instances, paid the larger legacy; once, a legacy given by the first, and again, a legacy given by the second will. One of the claims urged on the argument, is, that the court should declare that these legacies were cumulative, and that the legatees were entitled to both.

After the legacies, each of the wills gives the residue of the estate to "my beloved wife, Sarah R., and to my three infant children, Mary, Harriet and Susan B., jointly * * * to them and their heirs and issue forever." It provides for requiring from the widow a release of dower. It then declares: "In case of the death of my said wife, or of one of the said infant children, without issue from said children, or either of them, the said property devised to them jointly shall vest in the survivor or survivors of them; but in case of the death of the four, without issue from the children, the property shall vest in the children by my first wife or their [heirs] or representatives." Besides this, there is a power to the acting executor to lease or sell real or personal estate, beneficial to the estate, or necessary to the support of the said infant children, and a power to execute proper and necessary leases and conveyances during the minority of said children.

At the death of the testator, there survived his widow, who died intestate January 3, 1870, and the following children and grandchildren: By his first wife, George C. Chipman, plaintiff, his son; Charlotte C. Sherman, plaintiff, his daughter; Mary H. Ford, plaintiff, his granddaughter; George S. Chipman and John C. Chipman, plaintiffs, grandsons. By his second wife, Mary C. Shepard, defendant, his daughter; Harriet M. Wright, defendant, his daughter; Sarah B. Chipman, defendant, his daughter, an infant. Said descendants were the only heirs and next of kin of John C. Chipman, deceased. Mary C. Shepard has lawful issue, a son, born November 19, 1873. Harriet M. Wright has lawful issue, a daughter, born June 6, 1873.

This action was commenced in June, 1873. The Special Term, on the trial, dismissed the complaint, with costs.

Edward C. James, for the appellants.

L. W. Russell, for the respondents.

LEARNED, P. J. :

By the first will, George C. Chipman had a legacy of \$500 ; by the second, of \$300. By the first will, Charlotte C. Sherman had \$200 ; by the second, \$600. George C. Chipman has received \$500 ; Charlotte C., \$600. The plaintiffs now claim that these legacies were cumulative. However that may be, I see no right which these parties, as mere pecuniary legatees, have to bring a suit for the construction of the will. They should sue for their respective legacies, or take proceedings before the surrogate to compel the payment. Nor does it seem to me that, as to these legacies, they have a joint right of action. This remark applies to any other pecuniary legacies, if there be any others, which have not been paid. The wills were proved in 1860, and this action was not commenced till 1873. Nor do the plaintiffs aver, as a cause of action, the non-payment of any legacies, or the demand for payment of the same. They ought not, therefore, to maintain this action, merely on the question whether or not the legacies were cumulative.

Aside from this question of the cumulation of the legacies, it seems to be of little consequence whether the former will should be deemed revoked by the latter or not. The residuary clause, which is the clause really in controversy, is identical in the two wills, except that the word "heirs" is in the second will at one place (as shown above in brackets). It cannot be thought, however, that the addition of this word changes the meaning. There is, then, to be examined, only this residuary clause, and the claim of the plaintiffs in respect thereto. The plaintiffs' claim, briefly stated, is, that the power to lease and sell, in this residuary clause, made an express trust in the wife (the acting executrix), investing her with the estate during the minorities of the three infant daughters ; that therefore the residuary devise and bequest were void, as suspending the absolute ownership of personal, and power of alienation of real estate, during these minorities ; that therefore the estate vested in the heirs at law and next of kin. And further, that this residuary devise and bequest is void, on account of the life estates in joint tenancy, and the contingent remainders, irrespective of the illegal suspension under the alleged trust ; and that therefore the estate vested in the heirs at law and next of kin.

It is to be noticed, then, that the plaintiffs do not claim as *cestuis*

que trust, under the provisions of the will, or as trustees. But they claim adversely to the provisions of the will, which, as they allege, create a trust. They claim as heirs at law and next of kin. So far as the real estate is concerned, it seems to be settled that the heir at law or devisee, claiming a mere legal estate, cannot come into a court of equity to ask a construction of the will. He should bring ejectment. (*Walrath v. Handy*, 24 How., 352; *Onderdonk v. Mott*, 34 Barb., 106; *Woodruff v. Cook*, 47 id., 304; *Post v. Hover*, 33 N. Y., 593; *Bailey v. Southwick*, 6 Lans., 356.) These plaintiffs claim that, by reason of the invalidity of the residuary clause, the real estate passed to the heirs at law, including themselves. This is a question of legal title, to be tried by a jury.

An action for judicial construction is exceptional. In such an action the court acts, as it were, the part of adviser of the parties. And the ground of such an action is, that some person, usually the plaintiff, but some times the defendant, charged with an express trust, is at a loss to know how to perform it. The action should not be extended beyond its strict limits, because litigation is tempting when both sides are paid out of the fund. Generally it is better, as in other actions, that parties should litigate to enforce positive claims, and at the peril of costs. (*Smith v. Rockefeller* (10 S. C. [3 Hun], 295.) When parties have acquiesced in a will for ten years, it is doubtful whether the court ought not to leave them to their ordinary rights of action.

It is said that, in regard to personal estate, a rule must apply somewhat different from that applicable to real estate; that the executor always takes the title to personal estate as a trustee; that, so far as the provisions of a will are valid, he holds it as trustee for the persons to whom it is bequeathed; and, so far as invalid, for the distributees under the statute; that a court of equity has general jurisdiction of trusts; that, therefore, an action for construction of a will may be brought against an executor holding personal property, by one entitled as distributee. (*Bowers v. Smith*, 10 Paige, 193.) Assuming this doctrine to be correct, its application must depend on the fact that the executor has in his possession, when the action is brought, personal property, held thus in trust either, under the provisions of the will, for the legatees, or, if the provisions are void, then for the distributees, under the statute. Now, on exam-

ining the complaint herein, it will be found that there is no allegation that Montgomery, the surviving administrator *de bonis non*, with the will annexed, of Chipman, has any personal property in his possession. It is, indeed, alleged that, when the letters testamentary were issued, there was a large amount of personal property. But that was in 1863, ten years before the suit was commenced. It may have been disposed of in the payment of debts. All the allegations of the complaint, on the matter of the personal property, seem, as far as can be judged, to be denied by the answer. The justice who tried the cause distinctly omitted to find that personal property remained unadministered at the death of Mrs. Chipman, and made no finding that Montgomery, the administrator *de bonis non*, had any personal property in his hands. On looking at the case, no proof seems to have been made as to any personal property now in the hands of the administrator unadministered. There is a stipulation that John C. Chipman left a certain amount of personal estate, but that is qualified by the statement that "this admission is not to be construed to charge any of the defendants with any sum." In the face of this qualification, and of the finding of the justice, and after the lapse of ten years from the granting of letters on the will, it would not be our duty to assume, without proof, that there was any personal estate now unadministered. It is not a reply to this objection to say, that, if the executor or administrator has improperly applied the personal estate, he is liable. If an action were brought against the executor or administrator, charging him with having applied these alleged trust funds to certain parties, while they rightfully belonged to the plaintiffs, in such an action the actual present possession of trust property might not be essential. But the present is an action for the construction of a will, for directions to the executor or trustee as to his future conduct. The ground of the action is that the trustee has, in the future, some duties to discharge, as to which he needs the advice of the court. The party, then, as a material matter, should show that there are trust funds now actually in the trustee's hands, to be disposed of in the future under the trust, express or implied.

Much of the plaintiffs' argument implied that, as a matter of fact, the controversy respected real estate. The plaintiffs urged that a power to lease and sell property showed that there was a

trust. Now, so far as personal property is concerned, that argument is not needed. An executor, Chancellor WALWORTH said, in the case above cited, always takes the title to personal estate as a trustee. But as to the real estate, the argument was pertinent. Because, unless executors have power to receive the rents and profits of lands, they take no title (1 R. S., [m. p.] 730, § 75); and it was argued that a power to lease implied a power to receive rents and profits (*Tobias v. Ketchum*, 32 N. Y., 319); and that therefore the executors had a trust, and that the trust was void. Whether this was sound, or not, I do not say. But it was an argument applicable to real, not to personal estate. And indeed it may be said that the whole course of the plaintiffs' argument was to prove that the provisions of the residuary clause created an express trust, and not to claim that an executor, simply as executor, held the personal estate as a trustee. I notice this line of argument, on the plaintiffs' part, as evidence that, as would also seem from the proof, the controversy was really as to real estate. And as to real estate, as was said above, the heir at law, claiming a mere legal estate, cannot bring an action for construction of the will.

In my opinion, therefore, these plaintiffs, as mere pecuniary legatees severally of a few hundred dollars, could recover their legacies, if unpaid, in a simple way, and ought not, especially at this late day, to maintain an action for construction of the will.

As heirs at law, if the plaintiffs have any title to the real estate, it is, on their own view, a legal title vesting in them on account of the invalidity of the residuary devise. As owners of a legal title, they cannot maintain such an action as this.

In respect to personal estate it is not alleged, nor proved, nor found, that there is any unadministered.

There is therefore, no need of this action to advise the administrator, as trustee, how to administer; and the action is unreasonably late. On the construction of the residuary clause and the alleged trust, I express no opinion.

The Special Term was right in dismissing the complaint, with costs. But no construction should have been given to the will, lest future actions should be prejudiced.

The judgment appealed from should be modified, without costs of the appeal to either party.

JAMES, J. (dissenting):

The jurisdiction of a court of equity, of an action for the construction of a doubtful or disputed clause in a will, is incidental to that over trusts, and exists only where the court is moved on behalf of an executor, or trustee, or *cestui que trust*, and to insure a correct administration of the powers conferred by the will. (*Bailey v. Briggs*, 56 N. Y., 407.) Hence, when the will creates no trust estate, or powers in trust over the real estate, one claiming merely as an heir at law cannot maintain such an action. (*Post v. Hover*, 30 Barb., 312, 324; 33 N. Y., 593, 602.) But if the will does create a trust estate, or powers in trust over the realty, then the heir at law, although not named in the will, may maintain the action, for in such case, if the devise of the estate subject to the power is void, the grantee of the power is trustee for the heir at law; or, if the devise of the estate in trust is invalid, there is a resulting trust in favor of the heir. (*Bowers v. Smith*, 10 Paige, 194, 200.) The right of the heir to maintain such an action was fully established in a very recent case in this court, and that judgment was affirmed in the Court of Appeals. (*Kiah v. Grenier*, 1 N. Y. S. C., 388, 390; 56 N. Y., 220.)

As to the personal estate, the next of kin may always maintain such an action, for the executor takes title to the personalty as trustee, so far as the will is valid, for the legatees, and so far as it is invalid, for the next of kin; and the correct administration of his trust requires that *it should be determined in whose favor it is to be administered*, whenever the matter is one of doubt. (*Bowers v. Smith*, *supra*.)

The foregoing remarks apply to actions where the construction of the will is the only relief sought. It frequently becomes necessary to construe a will in determining actions brought to obtain other or further relief, *such as for an accounting*, partition, injunctions, etc. In all cases, therefore, where the plaintiff is entitled to maintain an action for some recognized mode of equitable relief, of which the court has jurisdiction, and the construction of a will is a necessary incident to affording the relief sought, such construction may be given. (*Post v. Hover*, 30 Barb., 312, 324.)

In this case, the will creates powers in trust over the real estate, and, as it seems to me, an express trust. The testator also left a

large amount of personal estate, and, in the absence of any proof that it has been expended, lost, or used up, it presumably remains, especially as it was the duty of the trustee to preserve it; and so late as 1870 new administrators were appointed to administer the trust, and are found by the court to have duly qualified and assumed its duties. The plaintiffs are heirs at law and next of kin of the testator. The will, or wills, plainly require a judicial construction. Under the rules above stated, the plaintiffs would, as such heirs at law, if next of kin, be entitled to maintain an action solely for the construction of these instruments, in order that the trusts, or powers in trust, both as to the realty and personalty, might be correctly administered.

But this action is not brought solely for a construction of said instruments. Indeed, such a construction is merely a necessary incident to the principal relief sought, to wit: *an accounting and final settlement and division of the estate*. The court has jurisdiction of the action entirely irrespective of the construction of the wills. Assuming the wills to be valid in every provision, the plaintiffs are entitled to an accounting, and to have the whole estate discovered and preserved, for they are named in the will as the ultimate residuary devisees and legatees, in the event of the death of the children of the second wife without issue; and it is only by such an action that they can compel the preservation of the estate to await the contingency. (*Studholme v. Hodgson*, 3 P. Wms., 300, 303, 304.) The fact that some of the children have had issue born does not affect their right of action. It only makes the contingency more remote. The issue may die before its parent, and the parent may die without issue; and in that event, the limitation over, if valid, would take effect. Again, assuming the wills to be invalid, the estate belongs to the heirs at law and next of kin, and in such case they are entitled to maintain an action for an accounting and division of the estate. It is only in the event that such a construction is given to the wills as to cut off the provisions in favor of the plaintiffs in the residuary estate, and vest the whole thereof absolutely in the children of the second wife, that the plaintiffs are not entitled to an accounting. But to arrive at such a conclusion it is necessary to *construe the said instruments*. And hence, the plaintiffs have the right to maintain this action,

and have the said wills construed as incidental to affording the further relief sought; and if, under such construction, they are entitled to any further relief, it should be awarded; or, if not, it should be denied.

The Special Term construed the wills, and, under such construction, decided that the residuary estate was the absolute property of the children of the second wife. It thereupon dismissed the complaint, with costs against the plaintiffs. Assuming that this construction given to the wills was correct, it was error to dismiss the complaint, for the judgment giving such construction should be allowed to stand as the decision of the case. And it was also an error to award costs against the plaintiffs, for the will confessedly required construction, and the plaintiffs, being in one event the residuary devisees and legatees, were entitled to it. Under such circumstances, equity always requires the estate of the testator, who made the doubtful or obscure will, to pay the expense of ascertaining its legal effect. (*Kiah v. Grenier*, 1 N. Y. S. C., 388; *Oxley v. Lane*, 35 N. Y., 340, 351; *Smith v. Smith*, 4 Paige, 271.) There is nothing in this case to take it out of the operation of the established rule.

But I entirely dissent from the construction given these instruments by the Special Term.

As to the revocation of the first will by the second, the surrogate had disposed of that question. He admitted both wills and the codicil to probate, "as wills of real and personal estate, and as, taken together, forming the last will and testament of the testator. This is conclusive upon all the parties, as a former adjudication. (*Baile v. Butterfield*, 1 Cox, 392, 393; *Morrell v. Dickey*, 1 Johns. Ch., 153, 156.) But it still leaves open the question as to what construction is to be given to the three instruments, when so taken together.

As to the money legacies, the law is well settled. They are presumed to be cumulative, unless the contrary intention is clearly expressed. (*Hooley v. Hatton*, H. & W. Lead. Cases in Eq., 285; *Dewitt v. Yates*, 10 Johns., 156-158.) The right of the legatee to several legacies, bequeathed by different instruments, is not repelled by circumstances which only raise a mere balance of an argument that the legacies are substitutinal. The primary and not the residuary

legatee is entitled to the benefit of the doubt the form of the bequest has created. (*Lee v. Pain*, 4 Hare, 236; *Wilson v. O'Leary*, L. R. [7 Ch. App.], 454.) In this case there is no evidence of intention sufficient to overcome the presumption; and, as both instruments have been established, we are bound to give full force and effect to the former, except so far as it is irreconcilably inconsistent with the latter. (*Brant v. Wilson*, 8 Cowen, 56; *Nelson v. McGiffert*, 3 Barb. Ch., 158.) As to the money legacies, therefore, so far as any matter concerning them may enter into this case, they are to be construed as cumulative, and not substitutional.

The residuary clauses in both wills are identical, and their legal construction is the important matter to be determined. In this we are to be guided by the intentions of the testator, as gathered from the language of the instruments and the extrinsic facts known to him. It is plain that the testator's intention was ultimately to vest the residuum in the issue of the children of the second wife, or if they left none, then in the children by his first wife, their heirs or representatives. But at the time of his death, his children by his second wife were infants, and it was necessary to provide for their support and education during their minority, as well as for the support of his wife during her lifetime. This, the testator says, he deems a paramount duty, and assigns it as the reason for making the provisions contained in his will. The purposes which he thus confessedly had in view, required the intervention of an express trust, indeed are the most usual purposes for which such trusts are created, and there can be no doubt the testator intended, by the provisions contained in the residuary clause of his will, to create an express trust in his executrix, which should vest the whole estate in her, and continue during the minority of his three children.

No particular form of words is necessary to create a trust. (*Fisher v. Fields*, 10 Johns., 496, 505.) The Court of Appeals, in *Vernon v. Vernon* (53 N. Y., 351, 359), laid down the rule in this language: "To constitute a valid trust under the statute, the trust must be declared in the instrument creating it; but it is not necessary that the purpose of the trust should be stated in the words of the statute. It is sufficient that a purpose within the statute is

clearly embraced in the language used, or that a power conferred in express terms includes a power over the estate, for the execution of which, the trustee may be clothed with the legal title." Examples of express trusts, held to have been created by implication from the language used and purposes intended, and of having pertinent application to this case, will be found in *Bradley v. Amidon* (10 Paige, 235); *Vail v. Vail* (4 id., 317, 328; 7 Barb., 226, 235); *Van Nostrand v. Moore* (52 N. Y., 12); *Tobias v. Ketchum* (32 id., 319, 327). In *Van Nostrand v. Moore*, it was decided that the trust will be implied, although the residuary clause commences with an absolute devise and bequest of the whole estate, as in this case. In *Tobias v. Ketchum*, it is held that a power to lease carries with it the power to receive the rents and profits, and when conferred upon executors who were clothed with authority to manage the estate for a given period, it created a trust which vested the title in them, although the word *trust* or trustee was not used, and there was no devise in terms to the executor.

In this case the testator, having in view the objects before mentioned, and deeming their accomplishment a paramount duty, authorizes his executrix to *lease* or sell, from time to time, such portions of his real or personal estate as in her judgment may be beneficial to his estate, or necessary for the support and education of his infant children, and for the proper support of his wife; and for this purpose, and for the purpose of managing his estate in the most prudent and economical manner, for the best advantage of his said wife and infant children, he authorizes his executor to execute all proper and necessary leases, contracts and deeds of conveyance, to the lessees or purchasers, during the minority of his infant children. So far as the power of sale above is concerned, it would be nothing more than a power in trust. But here we have the power to lease, carrying with it the power to receive the rents and profits, and the management of the entire estate, also conferred; and the declared purpose is one which requires the express trust for its due fulfillment; and the carrying out of this purpose, and application of the fund, are all placed within the judgment and discretion of the trustee. This plainly creates an express trust which vests the whole estate in the trustee, and renders it inalienable during the continuance of the trust. The power of sale may be

exercised, and the realty thus turned into personal estate; the income, and possibly a part of the principal, if necessary, may be applied to the support and education of the *cestuis que trust*; but the *corpus* of the trust fund is inalienable so long as the trust continues. (*Belmont v. O'Brien*, 12 N. Y., 394, 402; *Thomas' Estate*, 1 Tucker, 367, 370.)

The testator fixed the period for the continuance of this trust, as "during the minority of his infant children," and they were three in number at the time he died. To carry out his intentions, therefore, it is necessary to hold that these wills create an express trust of the whole residuum, to continue at least during these minorities. But for the purpose of the statute against perpetuities, a minority is reckoned the same as a life; and these minorities constitute an unlawful suspension. (*Haroley v. James*, 16 Wend., 62; *Thomas' Estate*, 1 Tucker, 367; *Post v. Hover*, 33 N. Y., 593, 597-599, 601; *Oxley v. Lane*, 35 id., 344, 345; *Everitt v. Everitt*, 29 id., 39, 71.) The personal estate is governed by the same rule as the realty. (*Campbell v. Foster*, 35 N. Y., 366, 370, 373; *Know v. Jones*, 47 id., 389.) Hence this express trust is void, unless the residuum can be separated into shares which are not severally suspended beyond the period prescribed. But the testator has, by express terms, precluded such a separation. The devise to the second wife and her children is made in joint tenancy, and not tenancy in common. They are not to take share and share alike. There are no shares. The property is given to them jointly; and this is sufficient to create a joint tenancy within the statute, especially as it is followed with provisions for survivorship. (*Coster v. Lorillard*, 14 Wend., 265-343.) The property is thus made an inseparable unit, and the absolute ownership of the personality, and absolute power of alienation of the realty, are unlawfully suspended during these joint minorities.

It is obvious that the testator never intended the disastrous consequences which must result to his testamentary schemes from this illegal trust; but it is equally clear that he did intend to make the testamentary dispositions which produce these results. His intentions are not to be judged by their consequences. He is not presumed to know the law in such a case. (*Van Kleeck v. The Dutch Church*, 20 Wend., 480.) He is deemed to have been ignorant of the ille-

gality of the trust, and to have intended that it should be performed, and this precludes the presumption that he could have intended a different disposition of his property. Hence, when it is apparent from the language of a will that a testator means to create an express trust, the plain import of the language cannot be departed from, though it results in rendering the will invalid. (*Van Nostrand v. Moore*, 52 N. Y., 12, 22.) We cannot, in this case, ignore the plain intent of the testator to create this express trust for three minorities, and we must construe the wills according to that intention, although the consequence may be to invalidate the entire testament.

This trust estate precedes all other interests in the residuum, and the further dispositions of the property are dependent upon it as a precedent estate. It was the means adopted by the testator for effecting his primary object: the support and education of his infant children. We are not at liberty to conjecture whether, if he had known that these provisions were void, he would or would not have made such a disposition of his property as would result from striking out the trust and retaining the other provisions of the will. It is the duty of the court to construe the will he has made; not to make a will for him. The doctrine of *cy pres* is now limited to cases where the provisions to be cut off are independent of the other dispositions of the will, and subordinate to them, and not an essential part of the general scheme. (*Manice v. Manice*, 43 N. Y., 303; *Know v. Jones*, 47 id., 389, 398.) Such is not this case. Here the trust estate is fundamental, and the objects for which it was created are declared by the testator to be paramount. We are not, therefore, at liberty to apply the doctrine. Nor does it help, that the residuary clause commences with an absolute devise. That was precisely the case in *Van Nostrand v. Moore* (*supra*), and yet, in consequence of the illegal duration of the express trust which the court implied from the further provisions of the will, the whole residuary disposition was declared void, and the property deemed to belong to the heirs at law and next of kin of the testator. The same result must follow in this case.

This conclusion renders it unnecessary to consider the further provisions of the residuary clause, which, aside from the express trust, are full of difficulty. After the three minorities, the whole

estate, given in joint-tenancy, is limited on the life of the widow, and possibly upon the life of that one of her three children who shall survive the other two ; making it necessary, in one event, for four lives to expire before it can be definitely known whether the residuum belongs to the children by the first wife, or the issue, if any, of the children of the second wife surviving them. These provisions must be construed without reference to the events which have happened since the testator's death, such as the recent birth of issue to some of the defendants. The devise must be so made, that it cannot, by any possibility, contravene the statute. (*Schettler v. Smith*, 41 N. Y., 328.) If the shares were separable, there would be no difficulty, for then the contingency as to each share would be determined at the death of the owner of such share. But, by reason of the joint-tenancy, the second wife and each of her three children became seized of the whole, and when any died, the whole belonged to the survivors, and so on to the last survivor, if the others, as may be the case, should die without issue. Hence, any separation is impossible ; and although the limitation is only upon one life, it is that one of the four which survives the other three, and that cannot be ascertained until three have expired. The limitations over would therefore be void under 1 Revised Statutes, 723, section 14, and the devise in joint-tenancy under section 15. If the life estates were successive, the remainders would vest on the expiration of the first two, and the overplus be cut off under section 17. But they are joint, and, if all stood, would themselves contravene the statute. They cannot all stand, and they are incapable of separation. It would seem, therefore, that they must fall, and the property pass, as in case of intestacy, wholly irrespective of the illegality caused by the express trust.

The receipt by two of the plaintiffs of their money legacies, does not debar them from maintaining this action, or receiving their inheritance, if the wills are set aside. It is true they cannot take under the will, and in avoidance of it. They must elect between the legacies and their inheritance. But an election is a choice between two or more rights, and cannot be effectually made until the party knows that he has such a choice. An act in ignorance of one's rights cannot be deemed an election, whether it be ignorance of law or fact. (*Sanford v. Sanford*, 9 S. C., 94 ; *Wake*

v. *Wake*, 1 Ves. Jr., 335; *Pusey v. Desbouvrie*, 3 P. Wms., 315.) The party is to be allowed to elect after the court has decided that he has an election. (*Hawley v. James*, 16 Wend., 142-254; *Know v. Jones*, 47 N. Y., 389-399; 1 Sand. Ch., 388.) Neither do these receipts create an estoppel. There is no proof that any one has acted upon them, or been misled to their prejudice, or that any one intended to mislead. All the elements of an estoppel are wanting. (*Sandford v. Sandford* (*supra*); *Jewett v. Miller*, 10 N. Y., 402.)

The judgment of the Special Term should be reversed and a new trial ordered, with costs to abide the event, on which trial an accounting should be had, and the estate settled and divided in accordance with the interests of the parties as heirs at law and next of kin, each to be charged with the amounts already received. Those parties who have received payments on account of money legacies, are to be allowed to elect between their legacy and their inheritance; and in case they elect in favor of the legacy, they are entitled to the legacies given in both instruments.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment as to dismissal of complaint affirmed, and, so far as it gives construction to the will, reversed, without costs to either party in either court.

HERBERT H. SANFORD, RESPONDENT, v. MARIA D. SANFORD, AS EXECUTRIX, ETC., AND IN PERSON, APPELLANT, WILLIAM A. SANFORD AND ANOTHER, RESPONDENTS.

2 R. S., (m. p.) 65, sec. 44 — 2 R. S., (m. p.) 456, secs. 64, 65 — *Post-testamentary child — share of, in estate of deceased parent — rule for determining — how assessed among devisees and legatees — Advancements — Legacy in lieu of dower.*

The rule as to the mode of determining the share of a post-testamentary child in the estate of his deceased parent discussed.

In order to determine the assessment among the devisees and legatees of a share ascertained to belong to a post-testamentary child, each devisee and legatee is charged with such proportion thereof as the aggregate value of the testator's estate, on the day of his death, after the payment of debts, bears to the share of the post-testamentary child.

Whether advancements are to be included when the share of the post-testamentary child is computed, but not when it is assessed, *quære*.

A legacy in lieu of dower abates like other legacies, and is not a charge upon the real estate, but is only entitled to a preference in payment from the personal estate over other legacies.

APPEAL by defendant Maria D. Sanford from a judgment entered on the decision of the court at Special Term.

The action was brought by a post-testamentary child, to recover his share of the estate of his father. The case has already been before this court. (61 Barb., 293.) It has since been tried before the Special Term. The plaintiff brought two actions in this court to recover the share of real and personal estate to which he would have been entitled, had his father died intestate: one action, pursuant to 2 Revised Statutes, 456, section 64, against the executors of Joseph H. Sanford, deceased, to recover his share of the personal estate of the deceased; the other action, pursuant to 2 Revised Statutes, 456, section 65, against the devisees under said will, to recover his share of the real estate of the deceased. In both actions he alleged that advances had been made to the defendants William A. Sanford and Joseph H. Sanford, of both real and personal estate, and prayed for an account and reckoning of all such advances in estimating his share. Both actions are consolidated under the above title, and the decree appealed from is entered in such consolidated action. From the decision, one of the defendants appeals.

No question is raised on this appeal involving the rights of the plaintiff. The only questions relate to the rights of the defendants, as to each other.

Edward C. James, for the plaintiff, respondent.

Charles O. Tappan, for the appellant.

H. L. Knowles, for the defendants, respondent.

LEARNED, P. J.:

First. The share of the post-testamentary child was computed, on the trial, as follows: Deduct one-third of the personal estate,

as for the widow's share, under the statute of distributions. Take the remaining two-thirds, together with the total value of the real estate of which the testator died seized, and the total of all advancements made to children in the testator's life. Divide the aggregate by the number of children, and the quotient will be the plaintiff's share; but his share of the real estate is subject to her dower.

There is no appeal from this part of the judgment, and therefore we have not to pass upon its correctness.

In the present case the advancements did not, as to any child, exceed the share of the estate, including advancements, which he would have had on an equal distribution. But if it had exceeded such share, some modification of the rule would seem to have been necessary, even if the rule be correct in general. For example: If a father had advanced \$6,000 to a child, A, during life, and then had died, leaving a will giving his whole property, worth \$3,000, to another child, B, and leaving, also, a post-testamentary child, C, under the rule adopted, unless modified, C would have taken the whole, and B nothing. It is not necessary, then, to decide at present, whether the provisions of 1 Revised Statutes, (m. p.) 754, section 24, apply to cases under 2 Revised Statutes, (m. p.) 65, section 44. The former section is, in words, limited "for the purposes of this section *only*." The share of the post-testamentary child is to be recovered "out of the parts devised and bequeathed." This point does not seem to have been involved in *Mitchell v. Blain* (5 Paige, 588; see *Thompson v. Carmichael*, 3 Sandf. Ch., 120).

There may be some question, also, whether the widow, having accepted the legacy in lieu of dower, should have dower in the share of the post-testamentary child. No appeal is taken on this point.

Second. Having ascertained the share of the post-testamentary child, by taking his equal portion of the estate, including advancements, the judgment assesses this share as follows: Each devisee and legatee is charged with such proportion thereof, as the aggregate value of the testator's estate, on the day of his death, after the payment of debts, bears to the share of the plaintiff, as above ascertained. It will be seen, therefore, that, as the advancements were included when the plaintiff's share was computed, but were

not included when it was assessed, there is a certain apparent irregularity in the assessment. The advancements were not in the same proportion as the legacies and devises. Thus the advancements had the effect to increase the assessments of the plaintiff's share on the legatee and devisee who had received no advancement. And this occasions one of the grounds of appeal. This apparent irregularity arises from the adoption of the rule, that, in computing the share of the post-testamentary child, advancements are to be included. And it is plain that it is not easy to assess the share in a manner which shall be consistent with the will and the statute, and also equitable. But assuming, as we must, that the share of the post-testamentary child is fixed, it seems to me that the statute positively determines its apportionment. (1 R. S., [m. p.] 65, § 44.) He is entitled to recover "from the devisees and legatees *in proportion to*, and out of, the parts devised and bequeathed to them by will." The language is plain. The recovery must be *in proportion* to the legacies and devises, and it is to be recovered *out of* these legacies and devises. The statute referred to by the appellant, relative to bringing suits by and against legatees, heirs and devisees (2 R. S., [m. p.] 456, §§ 64, 65), uses the words "just and equal contribution by the legatees," and "just and proportionate contribution by each devisee." This is not inconsistent with the former statute, which expressly establishes the proportion of the recovery, thus declaring what was just. And if there were any inconsistency, the former statute should govern, because the language of that statute is definite, and is intended to establish the rule. That of the latter is only intended to give power to enforce it. For these reasons, while I appreciate the apparent inequality which is so ably set forth by the appellant, I think that the plaintiff's share was in this respect assessed in conformity with the statute.

Third. It is claimed, on behalf of the appellant, that the legacies and devises to her, being in lieu of dower, and having been accepted, must be paid in full, and that she has a lien for the deficiency on the real estate devised to the respondents. The ground of this claim is that a legacy or devise in lieu of dower, when accepted, becomes as it were a purchase of the dower right; that it is not a merely voluntary gift; that the widow has

parted with value in consideration thereof, and that it should, for these reasons, be paid as a *quasi* debt—a price given for the relinquishment of her rights, which relinquishment has inured to the benefit of the devisees of the real estate. These views are set forth in *Isenhart v. Brown* (1 Edw. Ch., 411), and cases there cited; and they establish the doctrine that a legacy in lieu of dower shall not abate like other legacies. It appears to me that the same argument is very forcible to uphold the view of the appellant, viz., that a legacy in lieu of dower must be paid, even from the real estate. The widow is obliged to elect whether she will accept or not, within one year after her husband's death. (1 R. S., [m. p.] 742, § 14.) It is not till a year after the issue of letters, at the shortest, that the amount of the debts can be ascertained. (2 R. S., [m. p.] 88, § 39.) So that she is compelled to make her election before she can positively know the amount of the debts. If she elects, therefore, to take the testamentary provision, she must do so, I think, on the assumption that it will be paid, if there be any property with which to pay it. She gives up an estate in land, and I see not why those whose land is benefited by the bargain should not pay the purchase-price. But I am bound by the decision or opinion in *Babcock v. Stoddard* (3 N. Y. S. C., 207). The court in that case, admitting the justice of the claim, say that they have found no authority for it, and are not prepared to assert it. It must be noticed, however, that, in that case, the legacy in lieu of dower had not been accepted. The widow died a few days after the will was proved, without making an election. Thus the important element of a *quasi* bargain was wanting. She had parted with nothing, and might never have accepted the legacy. Still, I think it is better that we should follow the opinion of the court in that case than to have any conflict of views.

For these reasons, I think that the judgment should be affirmed, with costs to the defendants respondent, J. H. and M. E. Sanford, but not to the plaintiff.

JAMES, J. (dissenting):

But two questions are presented on this appeal: First, was the plaintiff's share properly assessed? Second, is the deficiency of the widow's legacy a lien on the real estate?

The only objection to the manner in which the plaintiff's share was assessed, is, that by making the assessment *pro rata*, the widow is compelled to contribute from the property given to her in lieu of dower, to make up that portion of the plaintiff's share which he is entitled to recover by *reason of the advancements* given to the elder sons. It was decided in *Mitchell v. Blain* (5 Paige, 588), that a widow's legacy in lieu of dower must contribute ratably with the other legacies to make up the share of an after-born child, and, as an equivalent, the widow was allowed dower in the real estate received by such child, because, if the father had died intestate, such share would have been subject to dower. That rule has been followed in this case; but in *Mitchell v. Blain* (*supra*) the question in this case presented did not arise, because there were no advancements in that case.

The child is entitled to the same share of his father's estate as if the testator had died intestate. (2 R. S., 65 § 49.) Had he so died, the advancements would have been so reckoned in ascertaining such share. (2 R. S., 97, § 76; 1 R. S., 754, § 23.) They were properly reckoned in this case, and no objection is made thereto by any party; but had the testator died intestate, then the advancements would have been deducted from the shares of the heirs and next of kin who received them, and they would only have been entitled to the difference, if any. (*Id.*) The appellant now claims that, inasmuch as the heirs who received the advancements, are respectively devisees under the will, of property sufficient in value, after making up their *pro rata* contributions to plaintiff's share, exclusive of advancements, to wholly pay the *increase* of plaintiff's share by reason of their respective advancements, such *increase* should be wholly assessed upon the devisees who received the advancements which create it, and not upon the appellant, who received no part of such advancements. There is a strong equity in this claim, and, unless there is some rule of law which prohibits its allowance, this equity should not be disregarded.

There are several provisions of statute in respect to the manner in which the legatees and devisees should contribute to make up plaintiff's portion. By 2 Revised Statutes, 65, section 49, it is provided that the after-born child "shall be entitled to recover the same portion from the devisees and legatees, in proportion to and

out of the parts devised and bequeathed to them by such will." By 2 Revised Statutes, 456, sections 64, 65, the Supreme Court is empowered to compel the legatees to make a "just and equal contribution," and to make the devisees make a "just and proportionate contribution," to make up such share. It is plain that the legislature, by these provisions, intended to invest the court with full power to do justice in such cases.

In most instances, a proportionate contribution would be just. But here is a case, where it seems to me to be grossly unjust. The widow, whose legacy and devise are in lieu of dower and all claims on the estate, and who received none of these advancements, is compelled to contribute equally with the devisees, who received the advancements. In other words, she is compelled to pay plaintiff about \$3,000, because the testator advanced William A. \$6,000 and Joseph H. \$10,245, although both these sons have enough given them by the will to pay the same in addition to all their other contributions. In such a case, equity requires that the increase by reason of advancements, be first paid from the property devised and bequeathed to the legatee or devisee who received them, until such property is exhausted, before the other legatees and devisees are called upon to contribute on account thereof; and such is the true application of the statute to this case. Therefore, the judgment should be modified by reassessing the plaintiff's share in accordance with the above views.

The deficiency of the legacy in lieu of dower is a lien upon the real estate passing under the will to the defendants, William A. and Joseph H. Sanford. Such a legacy is not a bonus or gratuity, but a price offered by the testator for his wife's interest in the real estate. When accepted, it amounts to a contract of purchase. (*Isenhart v. Brown*, 1 Edw. Ch., 411, and cases cited.) As between the widow and legatees and devisees, she is entitled to payment in full, while there is property enough of the estate to pay it. If the personalty is insufficient, it is a lien on the realty. (*Flynn v. Croniken*, 9 How., 214.) The devisees cannot take advantage of the relinquishment of the dower, and repudiate the payment of the consideration therefor; especially in a case like this, where the will requires that it *shall* not only be accepted, but shall also be *received* in order to be in lieu of dower.

The case of *Babcock v. Stoddard* (3 N. Y. S. C., 207) is of no authority on this last point. There the widow died without accepting the legacy. It was not then a contract, but an *offer* simply while it remained unaccepted, and hence was not a lien. The question in this case presented did not there arise.

The judgment should also be modified by adjudging the deficiency of said legacy, with the interest, to be a lien on that part of the real estate devised to William A. and Joseph H. Sanford which remains to them after contributing to plaintiff's share, to be paid from the proceeds of the sale of said part, in preference to all other claims thereon.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs to the respondents J. H. and M. E. Sanford, but not to plaintiff.

NANCY SUTTON, ADMINISTRATRIX, ETC., RESPONDENT, v. THE
NEW YORK CENTRAL AND HUDSON RIVER RAIL-
ROAD COMPANY, APPELLANT.

Railroad Co. — negligence.

When the evidence shows that a railroad company permitted people to acquire the habit of crossing its track frequently at a certain place, the company is not at liberty to allow cars to run over that portion of the track without any one to control them.

APPEAL from a judgment entered at the Rensselaer Circuit in favor of the plaintiff, for damages sustained in consequence of the killing, by the defendant, of the plaintiff's intestate, William C. Sutton.

The Troy and Greenbush branch of the defendant's road, as it enters the city of Troy, passes a short distance from the east bank of the Hudson river. Upon that east bank, and between the railroad and the river, are situated the foundry and stove works of Fuller, Warren & Co. The plaintiff's intestate, William C. Sutton, at the time of the accident by which he was killed, was employed in the carpenter shop connected with the foundry. It was

proved by several witnesses, that, for a long time prior to the accident, the employes of the foundry were in the habit of crossing the railroad track, at a point opposite this carpenter shop. That from the carpenter shop across the track is a regular beaten path. There are two tracks in front of the carpenter shop where the accident took place. At the same place there is a slight grade descending to the south. Just before the accident occurred, a train of ten cars backed up on the west track. Just before reaching the carpenter shop, five of these cars were disconnected, and the locomotive, with the other five, gave the five disconnected cars a "shove" or "kick," which sent them north so far that the south car was above or north of the door of the carpenter shop.

Just about the time these five disconnected cars stopped above the carpenter shop, Sutton started out of the shop with a pail on his arm, to go for some water to a well on the other side of the track. As he went down from the door of the shop, these five cars passed him going north. He waited till they had gone by and had stopped. He then attempted to cross the track, and actually crossed the west track to the space between the two. Just then a train backed up from the south on the east track. To avoid this, Sutton stepped back on the west track, which he had just safely crossed, and the five disconnected cars which were left without any locomotive attached, and with no one in charge of them, in running back down the grade, struck and killed him.

Upon these facts, the jury found that the defendant was guilty of negligence, and that the accident occurred without the fault of the plaintiff's intestate, and rendered a verdict of \$5,000 damages, from which the defendant appeals to this court.

Frank Loomis, for the appellant.

Esek Cowen, for the respondent.

LEARNED, P. J.:

The plaintiff's intestate, under the circumstances, was not a trespasser. He was on the defendants' premises, under an implied license. (*Driscoll v. N. and R. Lime and C. Co.*, 37 N. Y., 637.) He was not there, however, by their express or implied invitation.

The man who enters on another's land, along a road laid out and used for access to the house, enters by an implied invitation. The owner assumes an obligation in respect to the safety of the road, an obligation which does not arise from the mere acquiescence of the owner in the use of his land by others. (*Sweeney v. Old Colony and N. R. R. Co.*, 10 Allen, 373; *Phil. and R. R. R. v. Hummell*, 44 Penn., 375.)

In the very important case of *Gillis v. Penn. R. R. Co.* (59 Penn., 129), it is said that the owner is not liable to a trespasser, or to one who is on his land by mere permission, or by sufferance, for the negligence of himself or his servants. But that the trespasser, and, more strongly, the person who comes on land by a license, can maintain an action for *wanton* or *intentional* injury inflicted by the owner. That was the case of a person who was injured by the breaking of a platform. The plaintiff was not on the platform as a passenger, but, with others of a large crowd, to see some attractive sight. To the same effect are *Matze v. N. Y. C. R. R. Co.* (8 S. C. [1 Hun], 417), and *Nicholson v. Erie R. R. Co.* (41 N. Y., 530). But in these two cases the liability is said to be limited to cases of *intentional* injury. I cannot think, however, that the court intended to say that there could not be a recovery for what, in the case of *Gillis*, is called "*wanton*" injury. Because, in the case of *Driscoll v. N. and R. L. and C. Co.*, the plaintiff's intestate was on the defendant's land without right, and the administratrix was allowed to recover, on the ground of the defendant's negligence in not giving notice of a blast. Thus there was no *intentional* injury. There was what might be held to be *wanton* injury, or injury arising from culpable negligence. In the case of *Kay v. Penn. R. R. Co.* (65 Penn., 269), the defendants had leased a lot of land for their side tracks, and had the right to its exclusive possession. By sufferance they had permitted the public to pass over the lot. They detached some cars and sent them around a curve without a brakeman. They were held liable to a person upon that lot, who was run over by these cars. The court say that duties grow out of circumstances; that culpable negligence is the omission to do that which a reasonable, prudent and honest man would do; or it is the doing of what such a man would not do; that if an owner has allowed persons a use of his prop-

erty, tending to produce a belief that it will not be objected to, he is held to exercise his rights in this view, so as not to mislead others to their injury. (See Whart. on Negligence, §§ 811, 389; *Brown v. Han. and St. J. R. R. Co.*, 50 Mo., 461; *B. and O. R. R. Co. v. Trainor*, 33 Md., 542.)

It was right, therefore, in the present case, for the plaintiff to prove the long existing custom of crossing the tracks at this place, as indicating an acquiescence therein of the defendants. For having acquiesced in this use, they should exercise their rights, in this view, so as not to mislead others to their injury. It might be a wanton disregard of life to run trains on this part of the track in a manner permissible elsewhere. The foundry of Fuller, Warren & Co. stood close to the defendants' roadway, with doors opening thereon, and workmen (of whom the deceased was one) had been in the habit of crossing and recrossing for many years, and there was a well beaten path.

The defendants' counsel requested the court to charge that the defendants owed no duty to the deceased to set the brakes or otherwise fasten the cars. The court said that he declined, under the circumstances. It is insisted now that this was error, according to the decision in *Nicholson v. Erie Railway Company*. But the circumstances in the two cases were different. In that, the cars were left standing, and were started by a violent wind. This was a matter not to be foreseen by the defendants — not to be guarded against. In the present instance, if the theory be correct that the plaintiff was injured by the backward motion of the detached cars, there was no unusual or unexpected cause. No cause existed other than the alleged grade of the road. And if the grade of the road was such that cars would run down by the mere force of gravity, we cannot say, as the court was requested to do, that the defendants owed no duty to the deceased to set the brakes or fasten the cars. In the language already quoted, duties grow out of circumstances; and as the fact was, that, by the defendants' permission, persons were accustomed to cross the tracks at this place frequently, the defendants were not at liberty to allow cars to run without any one to control them.

The second request to charge was also too broad, and was rightfully refused. The fact that persons had been accustomed to cross

at this place did impose further care on the defendants than if the deceased had been a trespasser. That is, if a person were trespassing on the defendants' track, in an unfrequented place, they would be under no obligation to expect that he would be there. In such a place, running cars without a brakeman would not probably be negligence. But the defendants' duty was modified, when, by their implied consent, persons had been accustomed to go on the track. Although a man be a trespasser, the owner must not injure him by wanton negligence. (*B. and O. R. R. v. Trainor*; *Driscoll v. N. and R. L. and C. Co.*, *ut supra.*) So also as to cattle. (*Ibrell v. N. Y. and N. H. R. R. Co.*, 27 Conn., 404; *Corwin v. N. Y. and E. R. R.*, 13 N. Y., 42.) And it is worth noticing that the general railroad act, while it exempts railroad companies that make and maintain fences from damages for injury to cattle, excepts such as are "negligently or willfully done." Thus, too, in the often cited illustration from the civil law, the man who cuts a limb from a tree is liable, if it falls on one passing along a public or private way, unless he gives warning. But if it falls on one passing where there is no way, the pruner is liable only if he saw the person passing. For he cannot be blamed when he could not guess whether any one would be passing by. (Dig., 9, 2, 31.) This, too, was the doctrine of the case of *Driscoll*, above cited. And, therefore, it cannot be said that the court erred in charging that the defendants owed the duty that no injury should be done to the deceased, by any negligent act on their part, in the discharge of a lawful duty. What would be negligent would depend, as said in the case of *Kay v. Pennsylvania Railroad*, on the circumstances. The case of *Phil. and R. Railroad Company v. Hummell* (44 Penn., 375) is some times cited as contrary to these views. But that only holds that the company is not liable to a trespasser, unless want of ordinary care is shown. And that case, with the still more important case of *Gillis v. Pennsylvania Railroad*, is reviewed in the very careful opinion delivered in the case of *Kay v. Pennsylvania Railroad*. And it is there shown that nothing in these two cases conflicts with the rules laid down in the case last named. And the court, in this present case, expressly charged that if the defendants exercised ordinary care in the management of their cars, the plaintiff could not recover. Whether they did exercise ordinary

care was a question for the jury. And we must further notice that the court charged, that, if the defendants were watchful and had no knowledge of the deceased's presence on the track, they were not bound to take any other than their usual modes to keep the cars in position. It is well pointed out, in the case of *Baltimore and Ohio Railroad Company v. Trainor* (*ut supra*), that although a man be a trespasser in going upon the roadway of the railroad, yet that fact is not of itself negligence contributing to the accident, provided the circumstances were not such, when the party went on the track, as to threaten injury, and provided that, being on the track, he did nothing positive or negative to contribute to the immediate injury. The mere going on the track is not of itself negligence. And this is especially true where, by acquiescence for years, the company had permitted, and where the situation of the buildings almost compelled, persons to walk on the roadway.

There is nothing, then, in this case requiring a new trial. The judgment and order should be affirmed.

Present—LEARNED, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented.

Judgment and order affirmed, with costs.

JANE E. TABER, RESPONDENT, v. THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COM-
PANY, APPELLANT.

Negligence—contributory negligence—Evidence.

A train of defendant, upon which plaintiff was a passenger, ran a short distance beyond the station at which she wished to alight, stopped for a moment, and then backed down to the station. As soon as the train stopped, the plaintiff, who was in the last car, supposing it was at the station, and that it would remain there but a short time, without the knowledge of any one in charge of the train, left the car by the rear door, and was on the steps, getting off, when, by a sudden jerk of the train, made in backing to the station, she was thrown off and injured. It was a very dark night. There was no station platform

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or light where the plaintiff attempted to leave the car, nor at the usual stopping-place, which was across a highway in front of a hotel. The name of the station had not been announced, and no notice had been given to passengers to alight. The conductor saw the plaintiff after she fell, and made a signal with his lantern to stop the train, but it was not seen. There was no brakeman at the end of the car where plaintiff attempted to alight.

Held (1), that the defendant was not guilty of negligence; and (2), that plaintiff, by her negligence, contributed to the injury.

On the trial plaintiff was allowed to testify that she understood the train stopped at the station but a short time, and that the station agent's wife had so told her.

Held, error.

APPEAL from a judgment entered on a verdict in favor of the plaintiff, and from an order denying a motion for a new trial made on the minutes.

H. Hurlbut, for the appellant.

Chapman & Martin, for the respondent.

JAMES, J. :

This action was to recover for injuries alleged to have been caused by defendant's negligence. The defendant is a railroad corporation, and runs trains north from Binghamton, past Willard's Station. In January, 1873, plaintiff took passage at Binghamton, for Willard's Station, on the evening train. The usual stopping-place for the train at that station is across the highway, in front of a hotel. On this occasion the train ran a short distance past the stopping-place, but as soon as possible backed to that place. The plaintiff was in the rear car; as soon as the train stopped, without the knowledge of any of defendant's employes in charge of the train, she stepped out of the car door, at the rear, upon the platform, and was stepping down the steps, when, by a sudden jerk of the train, she was thrown off and injured. It was a very dark night; there was no station platform at the place where she attempted to alight, nor any station light. And these acts of the plaintiff took place before the train was brought at rest at the station; before the name of the station had been announced or notice to alight given.

It seemed some of her most serious injuries, after falling off,

arose from the backing of the train; and it seems that the conductor, from the steps of the forward end of the forward car, saw through between the cars a woman lying beside the rail, and, instead of pulling the bell-rope, or calling to the engineer to stop, gave a signal with his light, which was not seen, and the balance of the train passed, cutting her head.

On the foregoing facts arises the questions of negligence: 1st. Did the plaintiff, by negligence, contribute to the injury? 2d. Was the defendant guilty of negligence that caused the injury?

The case also contains exceptions to the admission of evidence. The plaintiff was allowed to testify that she understood the train stopped at Willard's but a short time; also to testify that the station agent's wife so told her. The plaintiff was allowed to show that safety-brakes were not attached to this train, by which a train could be stopped quicker than with others.

In most cases the question of contributory negligence is a mixed one of fact and law; yet, where the evidence is not conflicting, or where plaintiff's negligence appears by his own evidence, it is a question of law only. In this case there is no dispute about the facts. It is certain, but for plaintiff's own folly and negligence, she would not have been injured. It is not material that the train ran a few rods past the station. That did not throw the plaintiff off. It is not an uncommon thing for a train to run past a station. It is one of those things which, from the great momentum and weight of the train, cannot always be avoided. The implied contract between these parties was, that defendant would carry plaintiff to Willard's Station, notify her of the arrival, and when to alight. Instead of waiting for this notice, and before the train had been placed at the station, the plaintiff, without notice to, or knowledge in, the managers of the train, acted on her own volition, sought to alight from the train before it was time, and in doing so received the injury complained of; presenting a clear case where the plaintiff's own negligence was the sole and only cause of the injury. (*Johnson v. Hud. R. R.*, 20 N. Y., 65; *Hayes v. Gallagher*, 72 Penn., 136.)

The next question is as to the negligence of the defendant. The plaintiff's counsel specifies several particulars, wherein it is claimed the defendant was guilty of negligence, as follows: Plaintiff was a

woman and knew when the train stopped she was to get off; from what she had been told she believed she must get off quickly; there was nothing to indicate to her that the train had run by the station; the train was still; everybody was rushing to the front door to get out; she went to the back door as the safest. There is nothing in all these statements to show negligence in the defendant. They are mostly of a nature excusatory of the plaintiff's own acts. The defendant was not responsible for what another had told the plaintiff about the train, or the length of its stop; nor was it chargeable with knowledge of the plaintiff's fears; nor had its employes any information that she intended to run to the door and jump off on the first intimation of a halt.

It was urged, as a ground of negligence, "that when the plaintiff opened the car door, on going out from the light, it was very dark; that there were no station lights, and never had been; that there was no platform, and never had been; that there was no brakeman present to tell her the train would back up." Conceding all this true, and even that it was negligent, neither in any way contributed to the injury. But neither was an act of negligence. It certainly was not the fault of the company that it was dark; or that, on passing out of the car from the light, it appeared to the plaintiff very dark. Conceding there was no platform or station lights; neither was the cause of the accident. The proper place for either would have been at the station stopping-place, and not where the car stood when plaintiff left it. At the latter place none were required, and she did not wait until the cars got at the proper place, so that their absence from that place did not cause her to fall. So as to having a brakeman present to tell her the train would back up. Of her own accord she left the car at an improper time and place, and railroads are not required to keep a brakeman to aid passengers to alight at other than regular stopping-places. Had plaintiff waited until the train was at the station, *non constat*, a brakeman or conductor would have been present to help the plaintiff off the train.

The running of the train past the station was not the proximate cause of the injury: Had plaintiff retained her seat until the train was placed at the station, no injury like this could have happened to her. The conduct of the conductor, when he saw something lying

by the rail looking like a woman, in not using other methods to stop the train, did not cause the accident. Could the train have been sooner stopped, the extent of the injury might have been lessened. But her being there was through her own negligence, and the conduct of the conductor did not constitute neglect. On the law applicable to this case, I do not see how plaintiff can maintain an action against the defendant.

But there are other grounds for granting a new trial. The court erred in the admission of evidence. Plaintiff's understanding of the time the train stopped at Willard's Station, or what the agent's wife said about it, were not admissible as evidence against the defendant, and as such testimony may have influenced the jury, it ought not to be allowed to stand.

LEARNED, P. J., concurred.

BOARDMAN, J., dissented.

Judgment reversed and new trial granted, costs to abide the event.

PATRICK KING, RESPONDENT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
APPELLANT.

Negligence — duty of master to keep in repair machinery used by servant.

It is the duty of a master to see that his servants shall be under no risks from imperfect or inadequate machinery; and he is liable for any injury which may arise from his neglect to keep the same in repair, as well as for any imperfection in its original construction.

MOTION for a new trial, on exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiff, and from an order denying a motion for a new trial made on the judge's minutes.

This action was brought to recover for injuries alleged to have been sustained by the plaintiff in consequence of the falling of a derrick belonging to defendant; such accident being alleged to

have resulted from the negligence of the defendant in not furnishing a sufficient derrick, and also in not using due diligence in keeping the derrick in order. The answer denies the alleged negligence and avers that the injuries complained of were caused by the negligence of the plaintiff and his fellow laborers.

The defendant had placed a derrick on a dock belonging to it to aid in transferring steel and iron rails from boats to its cars and had contracted with one Dillon to unload the rails at a certain price per rail. A portion of the derrick fell on the plaintiff while engaged in hoisting a rail and inflicted the injuries to recover damages for which this action was brought.

It was claimed by the defendant that the plaintiff was a partner of Dillon, while it was claimed in his behalf that he was merely an employee.

Mathew Hale, for the appellant.

Amasa J. Parker, for the respondent.

LEARNED, P. J. :

It seems to me that some of the doctrines of *Wright v. New York Central Railroad* (25 N. Y., 562) have been modified. *Warner v. Erie Railway* (39 N. Y., 468) seems to establish that it is the duty of the master, not only to erect a structure to be used in his business without fault as to plan, construction and materials, but to supervise, examine and test it as frequently as custom and experience require. *Laning v. New York Central Railroad* (49 N. Y., 521) says that the duty to the servant is, that he shall be under no risk from imperfect or inadequate machinery. It is a duty to be affirmatively and positively fulfilled and performed. If the duty of the master is, that the servant shall be under no risks from imperfect or inadequate machinery, this certainly imposes some duty of maintenance as well as of original construction. It would be idle to say that the master was under an obligation to provide a safe machine in its original construction, but that he might allow it to become utterly and notoriously unsafe without incurring any obligation. In the language of the case last cited, the duty is not performed "until there has been placed for the

servant's use, *perfect* and adequate physical means." So, too, the case of *Coughtry v. Woolen Co.* (56 N. Y., 126) declares that the duty of the defendants toward any person invited to go upon the structure was "to use proper diligence in its construction and maintenance." And, on principle, the nature of the obligation must be the same. Of course, when a man has made a safe structure, he may reasonably expect that it will remain safe for a time. How long will depend on the nature of the structure and its use. How soon he must, as a prudent man, cause it to be examined, will depend on the circumstances of each case. But, I think, the decisions require from him reasonable attention to the matter, according to the amount of wear which the use of the machine causes. This was stated by the court in its charge: "It was further their [the defendants'] duty, as the derrick was in continued use, to examine it from time to time, and to make repairs when needed, so that persons using it could do so with safety." The court further charged, that if the plaintiff knew, or had reason to know, that the machine was dangerous, and continued to work, he could not recover. And further, that if there was a contract on the part of Dillon to take the responsibility of inspecting the machine and reporting its defects, and the plaintiff knew of this, he could not recover. This was sufficiently favorable to the defendants. An agreement by Dillon relieving the defendants from a duty imposed upon them by the law, should not take away from the plaintiff the right to have a safe machine provided for him—at least when he was ignorant of such agreement. If, as the cases hold, the defendants owed a duty to the plaintiff of providing and *maintaining* a safe machine, and then made an agreement with Dillon to repair, when notified by him, this did not release them from their duty to the plaintiff without his consent. The charge of the court stated the law carefully; and, as to the defendants' requests, it is well said by the Supreme Court of the United States: "It is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings." (*Railway Co. v. Whitton's Admr.*, 13 Wall., 270.)

The exceptions to the admission of evidence, with the qualifying remarks of the court in respect to them, do not, I think, warrant a new trial.

JAMES, J. (dissenting):

In April, 1872, the defendant erected upon the dock in Albany, a derrick for removing railroad iron from vessels to defendants' cars. The derrick, according to the evidence, was of suitable material, and sufficiently strong and well built for the purpose. It was not then of improper construction or unsafe. A contract was made by defendant with one Dillon, to remove the iron from the vessels to cars at that time, at four cents per rail, using the derrick. It was further agreed that defendant was to repair the derrick whenever they reported any thing was wrong. Dillon made an arrangement with plaintiff and others, by which they were to do the work and divide the pay equally between them. Plaintiff had worked the previous year in the same place and manner with Dillon and others. On the 1st of July, 1872, when plaintiff, Dillon, and others, were at work removing iron, the hook which held the tackle block to the top of the derrick broke, whereby a rail fell upon plaintiff and he was injured. The evidence shows that such break was caused by the gradual wearing away of the iron of the hook, until it was too weak to sustain the strain. Upon a claim that defendant was negligent in not keeping the derrick in repair, and in a safe condition to use, this action was brought, and a recovery of \$4,000 had. In *Wright v. N. Y. C.* (25 N. Y., 562) Judge ALLEN laid down the rule of liability in such cases as follows: "The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist * * * in the furnishing for the work to be done or for the use of the servant, machinery or other implements * * * improper and unsafe for the purposes to which they are to be applied * * * and if the injury arises from a defect or insufficiency in the machinery furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same through his own negligence or want of proper care; in other words, it must be shown that he either knew, or ought to have known, the defects which caused the

injury. Personal negligence is the gist of the action." Again, under the fifth subdivision, he says: "If the servant, sustaining an injury through * * * defects in the machinery furnished by the employer, has the same knowledge or means of knowledge of the deficiencies referred to as his employer, he cannot sustain an action for the injury, but will be held to have voluntarily assumed all the risks of the employment, incurred, as they were, by the * * * defective machinery used in the work." Again, in the sixth subdivision, he says: "If the injury was occasioned, notwithstanding such defects, by the negligence of a fellow servant, the master is not responsible." For these positions numerous authorities are cited by the learned judge.

From these principles, the following application may be made upon the facts of the present case.

The defendant, under its contract, was bound to furnish to its workmen under the contract a suitable and safe derrick. That was done. There was no liability of the defendant, therefore, in this respect. The company did not undertake, nor is it liable, for the continued sufficiency or safety of the derrick, except in case it knew or ought to have known of the defect or insufficiency. It is not claimed the company or its agents had actual notice of the defect in this hook. The contrary appears. Nor is there any reason for asserting that defendant or its agents ought to have known of such defect. By the contract the plaintiff and his associates, his copartners, were to give notice of defects, and defendant was then to repair. The duty to repair existed as well in the absence of, as with the contract. The only effect of the contract in that respect was to impose the duty upon the plaintiff and his associates, who were the only persons using the derrick, to examine it and give notice of any defects, that defendant might repair. The contract adds still greater strength to defendant's exemption from liability, under the principle that the servant had greater knowledge or means of knowledge of the deficiencies of the derrick than the defendant, and consented to assume the risks of the employment and of his own negligence in respect to the examination of the machine, which he was constantly using, and detection of its defects. It is not clear how the defendant can be made responsible to plaintiff for want of proper care and vigilance in the inspection of the

derrick and the discovery of its defects, when, by contract, it had exempted itself from such liability, imposing that duty and the duty of giving notice of any defect, on the plaintiff and his partners. If the defendant was guilty of negligence in this case, how much greater was the negligence of the plaintiff and Dillon?

I do not understand that the principles stated have since been controverted or doubted. They are still a correct exposition of the law. The case of *Coughtry v. Globe Woolen Co.* (56 N. Y., 124) is clearly distinguished from the present action. That was a case of neglect by the woolen company to furnish its servants machinery or implements originally well constructed and safe. It was a defect of original construction, for which, under the principles above cited, the party was responsible. If the original structure was perfect, no liability would ensue for injury to a servant by reason of defects thereafter occurring, unless the defendant had notice of such defects, or ought to have known of them in the exercise of ordinary care and prudence.

Plaintiff was, upon the proofs, a partner of Dillon in the work and in the use of this derrick. I do not see that it would modify the case, if, instead, plaintiff had been the servant of Dillon. The right to recover, and the principles upon which a recovery might be had, would be the same in either event. The negligence of Dillon is imputable to plaintiff; certainly plaintiff can have no greater claim against the defendant than if he had been its servant.

If the foregoing conclusions are justified, the learned judge at the Circuit so far over-stated the legal principles as to convey to the jury the impression that, in the absence of a contract absolving defendant, the defendant would be absolutely liable for any defects in this derrick which might during its use occur, irrespective of notice of such defects; that such liability arises from defendant's neglect to examine and inspect the derrick from time to time. It seems to me also to have been error to charge that plaintiff might recover if ignorant of a contract by which defendant was absolved from the duty of inspecting and watching the condition of the derrick, and Dillon had assumed that duty. If the guarded language of the charge raises doubts as to the justness of these criticisms, I think the refusal of the judge to charge the second and third requests removes such doubts. Those requests were :

Second. That if the agreement between Dillon and defendant was, that Dillon was to report to defendant's agent if repairs were needed, and that defendant was to make necessary repairs when such report was made, defendant cannot, upon the evidence in this case, be held guilty of negligence in regard to the hook in question, no report or notice of its insufficiency having been given to defendant or its agents. The court declined so to charge otherwise than had been charged.

Third. That under his agreement with Dillon, the plaintiff is in no better condition to maintain this action, than Dillon could have been, if he, instead of the plaintiff, had been the person injured by the accident in question. The court refused so to charge. I submit that both these propositions are sound law upon the facts presented, and that it was error to refuse to charge as requested. In this case a proper machine is furnished for Dillon and his associates, to use in the performance of defendant's work. They are set to work with it under an agreement that defendant shall make all necessary repairs upon being notified by Dillon and his associates that such repairs are needed. Neither Dillon nor his associates ever give notice of any defects, or ask for any repairs. They are constantly using this particular machine; they are competent to inspect and judge of its sufficiency, strength and safety. The particular defect through which the injury happened, could have been easily discovered, if an attempt had been made. Indeed, by the evidence of one witness, the condition of the hook could be seen from the dock. Is it saying too much when it is claimed that the defendant would not be liable? A more rigid rule would make masters guarantors of the safety of every piece of machinery, of every instrument, appliance or tool, put into the hands of a servant, so long as it was used by him. It would exempt every servant from the use of ordinary care and prudence. It would practically extinguish the distinction between the liabilities for injuries to passengers and employes. (*Warner v. Erie Railway*, 39 N. Y., 468, remarks of BACON, J., 475, 476.)

Flynn, one of Dillon's associates, was asked by plaintiff's counsel this question: "Whose duty was it, as you understand, when each of these contracts were made between Dillon and the company, and you were present, to inspect and examine that derrick and keep

it in order?" It was answered, subject to objection and exception: "I suppose it was Mr. Chittenden's." Then the further question: "Q. The company you mean? A. Yes." This evidence seems to me clearly inadmissible. Flynn was called by plaintiff to make out his case. After plaintiff had rested, defendant called Flynn and examined him as to the contract for making repairs, and what was said, and by whom. On his cross-examination, the above question was put and answered. I do not think these facts make any difference. The question asked for an opinion or conclusion of the witness, and not for a fact. It was as improper under the circumstances, upon cross-examination, as it would have been upon a direct-examination. Ordinarily not much consideration should be attached to such an error. But here the question calls for the opinion of the witness on a most important point. That is the most important question submitted by the court to the jury. "Did the defendant absolve itself from the duty of inspecting the derrick?" is the judge's charge. This witness is allowed to determine that fact by his opinion or conclusion from all he heard.

It was error also to allow proof that, after the accident, double irons were ordered put upon the derrick, and were so put on. (*Dougan v. Champlain Trans. Co.*, 56 N. Y., 1.) Perhaps, however the subsequent suggestion of the court that the evidence would be stricken out if the defendant desired it, has cured the error.

But upon the main question presented, I think the order denying a new trial should be reversed, and that a new trial should be granted, costs to abide the event.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Order affirmed, with costs.

JAMES HALSEY, RESPONDENT, v. EBENEZER M. REID,
APPELLANT.

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Statute of limitations — parol ratification of contract of infant — Code, § 110.

This action was commenced in November, 1873, to recover for goods sold, in June, 1867, to the defendant, who was then an infant nineteen years of age. The goods were not necessities. In September, 1871, the defendant, *by parol*, acknowledged the justness of the account against him for the goods, and promised to pay it. *Held*, that section 110 of the Code was inapplicable to such a case, and that such parol ratification and promise were valid; that plaintiff's claim not being capable of enforcement until ratified by defendant after reaching his majority, plaintiff's cause of action did not arise until then, and therefore was not barred by the statute of limitations.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action before the court, without a jury.

Shaw & Palmer, for the appellant. The claim in suit is barred by the statute of limitations, it being conceded that no action was commenced upon it within six years after the indebtedness is alleged to have accrued. (Code, § 91.) No verbal promise can be of any legal force to take the case out of the operation of title 2 of the Code, of the time of commencing civil actions. (Code, § 110; *Esselstyn v. Weeks*, 12 N. Y., 639; *McLaren v. McMartin*, 36 id., 88.) Such a promise is not even operative as an estoppel. (*Shapley v. Abbott*, 42 N. Y., 443.) Nor is it possible to maintain this action upon the theory that the cause of action accrued when the new promise was made, based upon the old consideration, for, although the original debt may furnish a good consideration, the obligation itself is void by the statute.

Youmans & Niles, for the respondent.

JAMES, J. :

This was an action for goods sold and delivered; the only defense, the statute of limitations. The action was commenced November 14th, 1873; the goods were sold June 1st, 1867; it was therefore certain that more than six years had elapsed between the sale and

the commencement of this action. The plaintiff further showed that, at the time of such sale and purchase, defendant was a minor of the age only of nineteen years, and that after defendant became twenty-one, to wit in 1869, he ratified said purchase, and by parol promised and agreed to pay for said goods; and plaintiff claimed that as no cause of action accrued to him which he could enforce until the purchase was ratified and promise to pay made after defendant had reached his majority, the statute of limitations did not commence until then to run.

It is not claimed by either side that the original indebtedness was for necessities; hence that obligation, though a moral one, could not be enforced. But the moral obligation existed, though incapable of enforcement, and furnished a sufficient consideration to support and uphold a promise to pay on arriving at age.

It is urged that such subsequent promise is void, for not being in writing under the provisions of section 110 of the Code. But that section has no application to this case. It has nothing to do with the question of infancy or a subsequent promise after maturity. That section has reference to title 2, part 2 of the Code treating of the time of commencing actions. I notice the reference to the cases of *Esselstyn v. Weeks* (12 N. Y., 638) and *McLaren v. McMartin* (36 id., 88) but in each case the question arose as to the statute of limitations; neither passed upon the question presented by this case. I regard the law now, in reference to parol ratification and promise to pay after maturity of a debt contracted during minority, the same as before the Code. A parol ratification and promise were then valid and are now valid. It is conceded that infancy is a personal privilege; but the contract of an infant is not void, only voidable. It cannot be enforced if the infant, or, after maturity, the adult resists. But after maturity it may be ratified by promise to pay, and, being based on a sufficient consideration, may be enforced whether in writing or by parol. Of the validity of a parol promise there may be some doubt, although I have none. It is based on sound morals and in furtherance of justice, and hence I hold it must be sound in principle.

A cause of action is a claim which may be enforced. (*Bucklin v. Ford*, 5 Barb., 393.) A cause of action cannot be said to have accrued until capable of enforcement. The statute of limitations

does not commence to run against a claim until there is some one against whom it can be enforced.

Therefore this claim was not barred ; it was not capable of enforcement until ratified by defendant after reaching his majority, and six years have not elapsed since he became twenty-one years of age.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment affirmed, with costs.

ALFRED B. CHAPIN, AS RECEIVER, ETC., APPELLANT, v.
JOSEPH THOMPSON, RESPONDENT.

Bond of indemnity — Statute of limitations — Costs.

More than six years after the cause thereof arose, an action was brought against the plaintiff herein, to recover the rent of certain premises which had been occupied by him as receiver. Against such an action the defendant had, by a bond of indemnity, covenanted to save and keep the plaintiff harmless. The plaintiff, although requested by the defendant to do so, refused to interpose to such action the defense of the statute of limitations, or allow the defendant to do so, but suffered judgment to be taken against him for the amount claimed. In this action, brought upon such bond, to recover from the defendant the amount of such judgment, *held*, that the defense of the statute of limitations stood upon the same footing with other legal defenses, and was to be treated with the same respect, and given the same favor and consideration, as common-law defenses; that it was the plaintiff's duty to have set up such defense to the action brought against him, or to have suffered the defendant to do so, and that, having refused to do either, he was not entitled to recover in this action; that the plaintiff was properly charged personally with the costs therein.

As between the obligee and obligor, in a bond of general indemnity against claims or suits, a judgment against the obligee is only *prima facie* evidence; and in a suit upon such obligation, the obligor may show collusion between the plaintiff and defendant in the original action, or that his principal had a good defense to such action, which he neglected or refused to interpose.

APPEAL from a judgment entered on the report of a referee, dismissing the complaint, with costs, and also from an order of the

Special Term charging such costs personally on the plaintiff. The appeal from the judgment was presented upon exceptions only.

Magone & Holbrook, for the appellant. The statute of limitations was a personal defense, which the plaintiff herein had a legal right to interpose as a shield, if he should so elect, but he was not either in law, morals, or good conscience bound to interpose it as a sword, by which an honest and lawful contract entered into by him, for which he had received value, which was justly owing by him, and which he knew he had never paid, might be defeated, because the defendant did not wish to pay according to the terms of his agreement. The statute only affected the remedy—it did not destroy the debt. The plaintiff herein stood in no such relations to the obligors in the bond, as made it his duty, at their request, to interpose a defense to a recovery in the action which was only personal to himself. The obligors in the bond did not stand in the relation of guarantors or sureties for the plaintiff herein, in his agreement to pay the rent. The bond given was to the plaintiff herein, and not to E. J. Chapin, and was not one of indemnity merely to the plaintiff for rent, but on the contrary was an agreement in the form of a bond, in which they promised to hold *the plaintiff harmless* against all claims, etc., which the plaintiff herein might become liable for, and for all contracts made by him in taking and holding possession of the property of the judgment debtor and the premises in which such property was situate. There was nothing in the bond that required notice to be given by the plaintiff herein to the obligors in the event of any suit being brought against him. The plaintiff herein did, however, give notice to Thompson, and expressed a readiness himself to set up any defense there might be to the action, except the statute of limitations, or to allow Thompson to do so with the above exception. The case of *Bridgeport Insurance Company v. Wilson and others* (34 N. Y., 275) is relied upon as an authority for the view of the law taken by the referee in the decision of the case at bar. An examination of the case above cited will disclose the fact, that the bond given in that case covenanted to indemnify against a certain claim of parties therein named and all suits to enforce it—where

the obligors made their liability to depend on the result of the litigation. The case of *Annett, Admr., etc., v. Terry* (35 N. Y., 256) was upon the bond of an administrator, where the sureties' liability depended upon the failure of their principal to discharge his trust. *Binsse and another, Executor, v. Wood* (37 N. Y., 526) was a question of the liability of a surety upon an agreement for the lease of certain premises by his principal. The liability of the obligors in the bond given and referred to in the suit at bar, was not in the nature of, or analogous with a bond given to depend on the result of a suit, or that of an administrator or receiver; but was an agreement that if the plaintiff herein would, as such receiver, take and hold possession of the property of the judgment debtor, and the premises in which it was situate, and sell the same, they would save him harmless from all costs, charges, etc., by reason thereof.

E. C. James, for the respondent.

JAMES, J.:

The action was upon a bond made by defendant, under seal, covenanting to save and keep harmless and indemnify said plaintiff, as receiver, from all damages, suits, judgments and executions, etc. The findings of the referee are acquiesced in by both parties, as stating correctly the facts; and the referee finds, that plaintiff was receiver, as set forth in the complaint; that such bond was made and delivered; that afterward the plaintiff herein, as receiver, at the request of the defendant, took possession of certain hotel property, and used the same four months and twenty-six days, under one Edward J. Chapin, agreeing to pay at the rate of \$655 per year; that said rent was not paid; that on the 27th of December, 1871, more than six years after said rent became due and payable, an action for the recovery thereof was commenced in the Supreme Court by said Edward J. against the plaintiff herein for the recovery thereof, and notice of the pendency of the action was given by the said Alfred B. Chapin to said Joseph Thompson, the defendant herein; that said Thompson then offered to take upon himself the defense of said action, and to retain and employ an attorney to defend the same; that the plaintiff herein refused to allow said Thompson to defend said action, unless he would agree

not to interpose as a defense thereto the statute of limitations; that said Thompson refused so to agree, and insisted that the statute of limitations should be interposed and set up as defense to said action, which said Alfred B. Chapin declined and refused to have done; and Thompson, the defendant herein, presented a petition in said action to the Supreme Court, and obtained an order therein requiring the said plaintiff and the said defendant therein to show cause before said court why said Thompson should not be allowed to defend said action; and upon the hearing of said petition, both the plaintiff and defendant therein appeared by their respective counsel, and opposed the granting of an order allowing said Thompson to defend said action; and thereupon an order was made therein denying the prayer of said petition, and said action was not defended. On the 25th day of April, 1872, the said Edward J. Chapin recovered a judgment in said action against the said Alfred B. Chapin, for \$459.95 damages, and \$27.09 costs, etc., which judgment has been paid by said Alfred B.; that at the time said action was commenced, the claim which it was brought to recover was barred by the statute of limitations. And the referee held, as conclusions of law, that it was the duty of the plaintiff in this action, upon the request of the defendant, Thompson, to have interposed, or have suffered said Thompson to interpose, the statute of limitations as a defense to the action brought by said Edward J. Chapin against said Alfred B. Chapin for the recovery of said rent; that having neglected so to do, and having refused to allow said Thompson so to do, upon being by him thereto requested, the plaintiff herein was not entitled to recover against said Thompson upon said bond; that the defendant herein was entitled to judgment, dismissing plaintiff's complaint, with costs, and judgment was ordered accordingly.

There can be no question as to the proper disposition of this case by the referee. It is now settled law in this State, that statutory defenses, such as the statute of limitations, usury, etc., stand upon the same footing with other legal defenses, and are to be treated by the courts with the same respect, and given the same favor and consideration, as common-law defenses.

As between the principal and indemnitor, in a case of general indemnity against claims or suits, the judgment against the obligee

is only *prima facie* evidence; and in a suit upon such obligation, the indemnitor may show that his principal had a good defense to the original action, which he neglected or refused to interpose, or collusion between the plaintiff and defendant in such action, and if either are established it will defeat a recovery. (*Bridgford Ins. Co. v. Wilson*, 34 N. Y., 275; *Annett v. Terry*, 35 id., 256; *Binsse v. Wood*, 37 id., 530, 531.) It is shown, and found by the referee in this case, that the plaintiff herein had a good defense to the action against him, of which he refused to avail himself, or allow the indemnitor to do so. By so doing he has now no cause of action against the defendant herein. The decision of the referee was correct.

This action, although brought by plaintiff in his name as receiver, was not necessarily so, as it was a matter entirely personal to himself, and not of any advantage to his receivership; in fact, he so characterized it, as he brought it without leave of the court. He also acted in bad faith in not defending the action brought against him, or in allowing it to be done by the indemnitor, without conditions. Under these facts, the Special Term properly directed him to be charged with the costs.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment affirmed, with costs, and order of the Special Term affirmed, with ten dollars costs and printing expenses.

DANFORD R. CUSHMAN, ADMINISTRATOR, ETC., PLAINTIFF,
v. THE UNITED STATES LIFE INSURANCE COM-
PANY, DEFENDANT.

Insurance — Evidence — policy admissible, without being accompanied by application therefor — conversations with administrator — Warranties — Statements.

A policy of insurance is properly admitted in evidence in an action brought to recover thereon, although the application therefor is not produced.

A conversation had between a witness and the administrator of a deceased person, prior to such decease and the administrator's appointment, in regard to such deceased person, is not admissible in evidence in an action brought to recover upon a policy of insurance issued upon the life of the deceased.

Where the papers show that the understanding of the parties was that the statements contained in an application for insurance, were not to be regarded as warranties, but representations only, it is necessary, in order to establish the invalidity of the policy, to show that such statements are fraudulent or untrue in a material matter.

A warranty is a statement on the literal truth of which the validity of the policy of insurance depends.

EXCEPTIONS ordered to be heard in first instance at the General Term.

This action was upon a policy of insurance on the life of plaintiff's intestate, tried before the court and jury. Plaintiff had a verdict for its full amount. A motion was made, on the coming in of the verdict, for a new trial on the minutes, which was denied. The court made an order that all proceedings be stayed, to enable the defendant to make a case and exceptions, and that the same be, in the first instance, heard at General Term. The defendant appealed from the order denying a new trial. The case is here, upon such appeal, case and exceptions.

E. B. Thomas, for the plaintiff.

E. S. Van Winkle, for the defendant.

JAMES, J. :

To maintain the action, plaintiff offered in evidence a policy issued by the defendant, upon the life of Burt Cushman, dated November 10, 1871. Its reception was objected to unless the application therefor was also produced, it forming part thereof. The objection was overruled and defendant excepted. This constituted the first exception. There was no error in the ruling. The policy was the evidence of the contract furnished by the defendant to the testator, and was admissible as evidence against it, without the application. The value of such evidence is not in question.

When the plaintiff rested, the defendant moved for a dismissal of the complaint. The court denied the motion, and defendant excepted. The ground of this motion was not stated, and hence, as there was evidence, *prima facie*, sufficient of the plaintiff's right to recover, the motion was properly denied.

A Dr. Greenleaf was called as a witness by defendant. On his direct-examination, he testified that he attended the intestate as a

physician in 1864, and that said intestate was sick in 1864, and was pretty sick again in 1867. On cross-examination, the doctor was asked if he ever saw intestate after that, and witness answered "Yes, frequently." He was asked: "Did he ever recover from said sickness?" Witness said he did. This was objected to and overruled, and defendant excepted. There was no error in this ruling. Witness was an expert; had been intestate's physician; and the question was proper and admissible on cross-examination. The defendant offered to show a conversation had by the witness Aldrich with the plaintiff, the administrator, before the death of the intestate, and prior to the date of the policy, in regard to the intestate. The plaintiff's counsel objected that the declarations of the plaintiff, before his appointment as administrator, not in the presence of the intestate, would not bind or affect the estate. The objection was sustained. The ruling was clearly right. In this there was no error.

At the close of the case, the court was asked to direct a verdict for the defendant, without stating the grounds or reasons therefor. The motion was properly refused.

The court was asked to charge the jury, that, if the intestate had been afflicted with disease of the liver at any time prior to the 4th of November, 1871, then plaintiff could not recover; or if he had ever been seriously ill prior to said date, then plaintiff could not recover. This the court refused, and defendant excepted. Also, that if the intestate was not in good health at said date, then plaintiff could not recover. That if, at said date, he had upon him a chronic disease of the liver, then, within the meaning of the law, he was not in good health, and plaintiff could not recover. That the declarations and statements of the intestate, contained in the application for insurance, are warranties, and, if fraudulent or untrue, any one of them, then the plaintiff could not recover. That if the intestate made untrue answers to any question contained in the application, the facts in respect to which, from their nature, must have been within his personal knowledge, then, in law, his representations were fraudulent, and the plaintiff could not recover. That, in order to make the statements or representations fraudulent or untrue, so as to avoid the policy and relieve the defendant from liability thereunder, it was not necessary that they should have been

made intentionally to defraud or mislead. That it was not necessary they should have been material. That the question was whether the statements and representations contained in the application were true or not. If untrue, whether made intentionally or not, and whether they were material or not, then the plaintiff could not recover. The court refused each and every of said requests, and defendant excepted. Defendant's counsel also excepted to that part of the charge which said: "If the deceased honestly and sincerely stated the facts as believed by him at the time, although he may have been mistaken, it would be no defense to the action."

The foregoing, I believe, are all the exceptions taken on the trial. They are all based on the theory that the answers to the interrogatories contained in the applications were absolute, unconditional warranties, irrespective of fraud or materiality, and that if any one of them was untrue, it avoided the policy. If such is the fact, then, as the charge was on the theory that the answers to some were untrue, though honestly made, and not material, the defendant will be entitled to a new trial, for error of the court in its instructions to the jury. Upon the construction of the law, as stated by the court, the motion for a new trial on the minutes was properly denied. There was ample evidence to warrant the finding of the jury, and the same should not be disturbed as against evidence. Neither the policy nor the application shows any warranty of the truth of the answers to the several interrogatories in the application. The policy declares that it is issued in consideration of the representations (not warranties) made in the application, and upon statements (not warranties) therein respecting, etc., "which application and statement are hereby referred to and made part of said contract, and upon the faith of which application, *statements and representations*, said company doth issue this policy," etc.; and the application, at its close, declares that the declarations and proposal therein shall be *the basis of the contract* between the assured and the company, and that if it contain any *fraudulent or untrue allegations*, all money paid shall be forfeited and the policy void, showing clearly that the fair construction of the papers, and probable understanding of the parties, was not a warranty made, but representations, which, if fraudulent or untrue in a material matter, avoided the policy. "A warranty in the law of insurance differs

from a representation in this: the former is a stipulation inserted in writing on the face of the policy, or in another writing referred to in the policy and made a part of it, on the *literal truth* or fulfillment of which the validity of the entire contract depends; a representation is a verbal or written statement made by the insured to the underwriter before the subscription of the policy," etc. (*Pierce v. Empire Ins. Co.*, 62 Barb., 644.)

In this view none of the requests or exceptions of defendant's counsel were well taken, and judgment should be ordered for the plaintiff on the verdict.

LEARNED, P. J., and BOARDMAN, J., concurred.

New trial denied and judgment on the verdict directed for plaintiff, with costs.

ORLANDO M. SMITH, PLAINTIFF, v. JAMES WARDEN,
DEFENDANT.

Warrant—recital in, of legal offense—when officer protected in execution of.

Where a warrant shows a case within the jurisdiction of the justice issuing it, although it does not recite a legal offense, the officer executing it will be protected in so doing.

MOTION for a new trial on a case, and exceptions ordered to be heard in the first instance at General Term.

E. H. Prindle, for the plaintiff.

H. Ballard, for the defendant.

JAMES, J.:

This action was for false imprisonment. The case shows that defendant was a constable of the town of Solon, Cortland county, and Samuel McGuire, a justice of the peace of said county. That, on the 31st day of March, 1871, the said McGuire, as a justice of

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the peace, issued a warrant against the plaintiff, directed to the sheriff or to any constable of the county of Cortland, to arrest Orlando M. Smith, the said plaintiff, and bring him before said justice, at his office in the said town of Solon, to answer, etc., and delivered said warrant to one Pierce, also a constable of said town of Solon. That said Smith was found by said Pierce in the county of Chenango; and that, on procuring said warrant to be indorsed over by a justice of the peace of the county of Chenango, the said Pierce, as constable, arrested said Smith and brought him to the said town of Solon, and there left him in the custody of the defendant, as constable (he being a tavern-keeper), to keep over night, which is the imprisonment complained of.

When the plaintiff rested, the warrant was put in evidence by defendant, and read as follows:

CORTLAND COUNTY, TOWN OF SOLON, ss.:

To the sheriff or any constable of said county: Whereas, complaint, on the oath of Nathan R. Brown, has been made before the undersigned, a justice of the peace of said town, that, on or about the 23d day of September, 1870, at Solon, in said county, one O. M. Smith did, by false statements and false representations, induce this complainant to take his (Smith's) note, to the amount of twenty dollars, by statements, to wit: That he (Smith) had a large sum of money in the bank at Norwich, in Chenango county, and that the town owed him \$100, which statements were false and untrue; and that the town did not owe him, and he did not have the money in the bank at Norwich, and the whole was false.

These are, therefore, in the name of the people of the State of New York, to command you forthwith to take the said O. M. Smith and to bring him before me at my office in said town, to answer to the matters contained in said complaint, and to be further dealt with according to law.

Dated at said town the 31st day of March, A. D. 1871.

S. McGUIRE,

Justice of the Peace.

And thereupon the defendant moved for a nonsuit, which was denied, and defendant excepted.

The defendant, having testified his version of the case, rested. Thereupon the defendant's counsel asked the court to charge the jury, that the warrant was a protection to him as constable, and that he was entitled to a verdict, which was refused, and defendant excepted. The court instructed the jury that the warrant was illegal, because it did not comply with the statute and recite a legal offense on its face as the ground of arrest. To this the defendant excepted.

The only question presented by the case and exceptions, is the sufficiency of the warrant as a protection to the officer. Ever since the case of *Savacool v. Boughton* (5 Wend., 170), it has been a recognized principle of the law of this State, that the process of a magistrate having jurisdiction of the subject-matter, fair on its face, protected a ministerial officer in its execution. In this case the justice of the peace had jurisdiction over the subject-matter of the warrant. On a complaint being made he was bound to entertain it and exercise his judgment; and whether the facts disclosed a *prima facie* offense, was certainly a question of law. In this case the magistrate adjudged that it did, and issued his warrant accordingly. It was claimed that the recitals in the warrant did not show an offense. In *Stewart v. Hawley* (21 Wend., 555) the court said: "Recitals of the offense in a warrant may be very brief. The object of the recital is to enable the defendant to see whether the offense be bailable, so that he may appear prepared with bail, or with any defense admissible, on the return of the warrant. The better opinion of the common law seems to be, that a recital of the offense in the warrant is not essential." (*Atchinson v. Spencer*, 9 Wend., 62.) I am therefore of the opinion, that, notwithstanding the warrant did not recite a legal offense, it showed a case within the jurisdiction of the justice; a case in which he had exercised his judicial functions, and issued his mandate as the result of such exercise; and that the officer was protected by it in the exercise of the duty devolved upon him as such officer by its command. It was said in *Campbell v. Ewalt* (7 How., 400), where the justice had been sued for false imprisonment, "that the complaint upon which the warrant issued and under which the plaintiff was arrested and imprisoned, did not set forth a criminal offense" etc. "But the complaint gave the

justice jurisdiction of the case" etc. It followed that the warrant was a protection to the justice and also to the complainant.

It follows from these views, that the court erred in refusing to nonsuit, in its refusal to instruct the jury as requested, and in instructing them as it did. The warrant was a complete protection to the defendant, as constable.

New trial granted, costs to abide the event.

MEMORANDA
OF
CASES NOT REPORTED IN FULL.

ANN T. WALLACE, APPELLANT, *v.* LEAH B. STORRY,
EXECUTRIX, AND OTHERS, RESPONDENTS.

Note of married woman — when charged against her distributive share of payee's estate.

In 1867, appellant and her husband gave their joint and several promissory note for \$1,000, payable five years after date, with interest, to the defendant's testatrix, her heirs or assigns. The husband died in 1871. After the death of the testatrix, the appellant promised her executor to pay the note. *Held*, that the amount of the note was properly charged against the appellant's share as a legatee under the will of the testatrix.

On the appeal from the decree of the surrogate the will was not returned with the papers. *Held*, that in its absence every presumption was against the appellant. (*Carman v. Pultz*, 21 N. Y., 547; *Williamson v. Field*, 2 Barb. Ch., 281.)

APPEAL by Ann T. Wallace from a decree of the surrogate of Ulster county upon a final settlement of the accounts of Leah B. Storry, as executrix of the will of Blandina Storry, deceased, by which decree the appellant was charged with the amount of a note given by her husband and herself to the deceased in her lifetime.

J. M. Cooper, for the appellant.

A. Schoonmaker, Jr., for the respondents.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Decree affirmed with costs against the appellant personally.

ANANIAS BOYCE, RESPONDENT, v. CYRUS WASHBURN,
APPELLANT.*Statute of frauds—contract for sale of logs—interest in lands.*

This action was brought to recover the price of 206 logs, sold to defendant. The defense was that these logs were delivered under a contract, by which the plaintiff's assignor agreed to deliver to the defendant all the market pine saw-logs that could be cut from the "Perry" lot, in Wilton, the logs to be delivered at defendant's saw-mill, at two dollars per log, in the years 1873 and 1874, and to be measured and counted at said mill, which logs the defendant agreed to accept and pay for; that the plaintiff's assignor cut a large number of logs from the lot, in addition to the 206, which he refused to deliver to the defendant, by means of which the defendant had sustained damage. *Held*, that this was not a contract for the sale of standing timber, and that it was not essential to its validity that it should be in writing, and therefore such defense could be established under it.

Green v. Armstrong (1 Denio, 550) distinguished; *Kilmore v. Howlett* (48 N. Y., 569) followed.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict directed by the court.

John C. Hulbert, for the appellant.

J. P. Butler, for the respondent.

Opinion by LEARNED, P. J.

Present—LEARNED, P. J., and BOARDMAN, J.

Judgment reversed and new trial granted, costs to abide the event.

THE NATIONAL STATE BANK OF TROY, RESPONDENT,
v. CHARLES H. RISING, IMPLEADED, ETC., APPELLANT.

Alteration of note — ratification of, by indorser — evidence — Appeal from judgment — when questions of fact not considered on.

An action may be maintained against an indorser of a note, who ratifies and promises to pay the same, with full knowledge of the fact that the same has, subsequent to his indorsement thereof, been altered by adding thereto the words "with interest." (*Commercial Bank v. Warren*, 15 N. Y., 577; *Huntington v. Ballou*, 2 Lans., 120; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Hazard v. Spears*, 2 Abb. Ct. of App. Cases, 858.)

Upon the trial of such an action, evidence tending to show that the words "with interest" were or were not written at the same time, and with the same pen and ink, is admissible. (*Dubois v. Baker*, 80 N. Y., 855.)

Upon an appeal from a judgment entered on the verdict of a jury, where no motion for a new trial has been made, no question of fact will be considered. (4 Wait's Sup. Ct. Pr., 295.)

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

C. F. Tabor, for the appellant.

Esek Cowen, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

THOMAS C. WALBRIDGE, RESPONDENT, v. EDWARD D. JAMES AND OTHERS, APPELLANTS.

Judgment on referee's report — how irregularity in, corrected — Remedy, where referee has not been duly appointed.

Where, in an action brought to foreclose a mortgage, the referee's report states the amount due at the time of the commencement of the action and that due at the date of his report, before which latter date, after the time of the commencement of the action, a payment of principal fell due, under the provisions

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of the mortgage, and the judgment sets forth the latter amount as due, the remedy of the defendant is by motion to correct the judgment and conform the same to the report, and not by an appeal therefrom.

Nor will a judgment be reversed and a new trial granted, on the ground that the referee was not duly appointed, by fit and proper words in the judgment, to make the sale. The remedy of the party aggrieved is by motion at Special Term.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

E. D. James, for the appellants.

John C. Hulbert, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

MARGARET HUNTER, APPELLANT, v. THE AMERICAN
POPULAR LIFE INSURANCE COMPANY, RESPONDENT.

Right to open and close case.

Where, in an action upon a life insurance policy, a copy of which is set forth in the complaint, the answer "admits each and every allegation in the complaint contained, except that they deny that the paper marked 'A,' annexed to the complaint, is a full and complete copy of the policy issued by them:" *Held*, that the answer in substance and effect denied the making of the contract set up in the complaint, and that plaintiff was entitled to open and close the case.

APPEAL from a judgment in favor of the defendant, entered upon a verdict directed by the court, and from an order denying a motion for a new trial.

Matthew Hale, for the appellant.

George Bliss, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., and BOARDMAN, J.

Judgment and order reversed, and new trial granted, costs to abide the event.

HENRY VAN DENBURGH AND OTHERS, RESPONDENTS, v.
THE PRESIDENT AND TRUSTEES OF THE VILLAGE
OF GREENBUSH, APPELLANTS.

Mechanic's lien — act for Rensselaer county — public buildings — exemption from act.

Chapter 778 of the Laws of 1866 (p. 9), establishing a mechanics' lien law for Rensselaer county, was not repealed by chapter 558 of the Laws of 1869, as amended by chapter 194 of the Laws of 1870.

Quare, whether the exemption from the lien law of the corporate property of a municipality used for a public use, established by the decision of *Brinkerhoff v. Board of Education* (6 Abb. [N. S.], 428), does not depend on the use actually made of the buildings, and not upon that for which they were intended. That is, whether the principle laid down in *Brinkerhoff v. Board of Education* would not apply to a building not actually used for a public purpose, whatever the intention of the village might have been when the contract was made.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

R. A. Parmenter, for the appellants.

G. P. Jenks, for the respondents.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

JOSEPH RUTHERFORD, APPELLANT, v. ALEXANDER
GRAHAM, RESPONDENT.

Doweress — sale of interest of — what constitutes — lease.

A widow, being in possession of certain lands which had been admeasured to her for her dower, executed an instrument under seal, whereby she "leased and to farm let," the same to the defendant, from April 1, 1868, to April 1, 1874, for which he agreed to pay her \$500 at the date of the said agreement, and in case she was living at the expiration of that time, the lease was extended for the term of her natural life, for which defendant agreed to pay her \$400 within ten days after April 1, 1874, with interest from April 1, 1868, until it should be paid. *Held*, that this was a sale of the estate of the doweress, and not a lease thereof, and that it was not in violation of the fourteenth section of the first article of the Constitution. *Parrell v. Stryker* (41 N. Y., 480) followed. The right to dower comes by law, and the heir may assign the same to the widow voluntarily. The admeasurement fixes only the location and extent.

APPEAL from a judgment in favor of the defendant, entered upon a verdict directed by the court.

Edward C. James, for the appellant.

Magone & Holbrook, for the respondent.

Opinions by LEARNED, P. J., and JAMES, J.

JAMES, J., dissented.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

SAMUEL B. WILLEY, ADMINISTRATOR, PLAINTIFF, v. IRA SHAVER AND ANOTHER, DEFENDANTS.

Award — construction of.

An appeal having been taken to the County Court from a judgment of a justice of the peace, the case was, by consent of the parties, submitted to an arbitrator, who awarded to the plaintiff's intestate "the sum of twenty-five dollars, and the costs, if any, recovered by her before Charles G. Day, justice." *Held*, that the plaintiff was entitled only to such costs as were owing to the deceased at the time of the award, and that as the costs had already been paid, they could not be recovered a second time upon the award.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict directed by the court.

Jerome Rowe, for the plaintiff.

King & Montgomery, for the defendants.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Motion for new trial denied, and judgment ordered on verdict.

WILLIAM ROOT, PLAINTIFF, v. EDWARD J. BROWN, DEFENDANT.*Evidence — Admissions — admissibility of other statements made at same time by same person.*

In order to give in evidence against a party his admissions, it is necessary to examine the party first as to whether or not he has made such admissions. Whatever was said by the same person, in the same conversation, that would in any way qualify or explain the statement proved to have been made by him, is admissible in his favor. (*Rouse v. White*, 25 N. Y., 170.) And although the party alleged to have made the admissions is asked by the adverse counsel,

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before proof is given of such statement by him, whether he so stated or not, he is not thereby precluded from giving evidence, after the proof of such admissions on his part has been made, of other statements made by him in the same conversation.

EXCEPTIONS ordered to be heard in the first instance at the General Term.

The action was in ejectment, and the issue was as to whether or not the plaintiff had delivered a deed of the premises in dispute to the grantor of the defendant.

Betts & Grover, for the plaintiff.

Hughes & Northup, for the defendant.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., and BOARDMAN, J.

New trial ordered, costs to abide the event.

THE PEOPLE EX REL. JAMES B. JERMAIN, RESPONDENTS,
v. FRANCIS S. THAYER, AS AUDITOR OF THE CANAL DEPARTMENT, APPELLANT.

Canal claims — chap. 821, 1870; chap. 836, 1866.

By chapter 821 of the Laws of 1870, the canal appraisers were authorized to hear and determine all claims against the State, etc. All claims for damages which should have accrued more than one year prior to the passage of the act, were to be filed within one year from the date thereof. The claim in dispute was so filed. By section 5, chapter 836 of 1866, claims were to be filed within one year after the injury. *Held*, that even as to claims embraced within the latter statute, its provisions could not be considered as limiting those of the act of 1870; and further, that as this objection was not raised before the appraisers, nor their action reviewed either by appeal to the canal board or by *certiorari*, the matter must be considered as settled.

APPEAL from an order granting a peremptory mandamus to issue against the defendant, to compel him to issue his warrant for the payment of an award made by the canal appraisers.

George W. Miller, for the respondents.

Charles S. Fairchild, deputy attorney-general, for the appellant.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Order affirmed with costs.

NORMAN COX AND ANOTHER, ADMINISTRATORS, ETC., APPELLANTS, v. WARREN S. WIGHTMAN AND OTHERS, RESPONDENTS.

Assignment of mortgage to escape taxation — effect of.

This action was brought to recover the amount of a mortgage collected by the defendants, which had been assigned by the plaintiffs' intestate to the defendants' testator. The plaintiffs claimed that the assignment was invalid, for the reason that it was made to enable their intestate to escape taxation. *Held*, that the assignment was valid to pass the title to the mortgage, and that as the intestate had put his property out of his hands for the purpose of escaping taxation, the court would not help him to get it back.

APPEAL from a judgment in favor of the defendants, entered upon the report of a referee.

E. H. Prindle, for the appellants.

R. A. Stanton and Jenks & Matterson, for the respondents.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

ABRAM FRYER, RESPONDENT, v. STEPHEN ROCKEFELLER
AND OTHERS.

Foreclosure sale — defects in title — when purchaser not excused by.

The purchaser at a mortgage foreclosure sale cannot refuse to carry out his purchase on account of defects of title prior to the execution of the mortgage foreclosed. It is the equity of redemption that is cut off by the sale; that is all that the law authorizes to be done, and the purchaser is bound to know, when he bids, that he is getting nothing else. (BOARDMAN, J.) (2 Barb. Ch. Pr. [2d ed.], 529; *Holden v. Sackett*, 13 Abb., 478.)

APPEAL by Isaac B. Findull, the purchaser at a sale, under judgment of foreclosure and sale in this action, from an order made at the Saratoga Special Term, directing the purchaser to perfect his purchase, etc.

Isaac L. Egbert, for the appellant.

L'Amoreaux & Dake, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

LEARNED, P. J., concurred in the result, for the reason that adverse possession appeared to have accompanied the paper title claimed under since 1833.

Order affirmed, with ten dollars costs and expenses of printing.

EM ELIZA SHEAR, RESPONDENT, v. THE PHOENIX MUTUAL
LIFE INSURANCE COMPANY, APPELLANT.

Insurance agent — power of, to waive conditions of policy.

A general agent of an insurance company may waive payment of the premium when due and thereby bind the company. The existence and validity of the contract being conceded, an agent may waive or disregard conditions therein without destroying its vitality. (*Bodine v. Exch. Fire Ins. Co.*, 51 N. Y., 117; *Miller v. Phania Ins. Co.*, 27 Iowa, 203; 1 Am. R., 263; *Carroll v. Charter Oak*

Ins. Co., 10 Abb. [N. S.], 166; *Ins. Co. v. Colt*, 20 Wall., 560, 568; *Owen v. Farmers' Joint Stock Ins. Co.*, 57 Barb., 518; *Sheldon v. Atlantic F. and M. Ins. Co.*, 26 N. Y., 460; *Trustees of First Bap. Ch. v. Brooklyn Fire Ins. Co.*, 19 id., 305; *Rowley v. Empire Ins. Co.*, 36 N. Y., 550; *Boehen v. Williamsburg F. I. Co.*, 35 id., 181; *Whitwell v. Putnam Ins. Co.*, 6 Lans., 166; *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 id., 277.)

APPEAL from a judgment in favor of plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial upon the minutes.

This action was brought upon a life insurance policy issued to plaintiff upon the life of her husband. The only defense interposed was the non-payment of the semi-annual premium due and payable August 31, 1872, whereby the policy became dead and of no further force or validity.

The plaintiff gave evidence tending to show that in July, 1872, her husband saw Weller, defendant's agent, and offered to pay the premium to become due August thirty-first thereafter; that Weller then waived such payment, saying he had not the company receipt and that he would keep him good with the company. Weller denied such conversation and waiver.

Under these facts it was left to the jury to say whether there had been a waiver of payment legally binding upon the company.

Samuel Hand, for the appellant.

R. E. Andrews, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

JAMES, J., dissented.

Judgment affirmed, with costs.

PETER S. MOORE, RESPONDENT, v. DAVID H. BIXBY,
APPELLANT.

Statute of frauds — delivery of personal property.

Mere words are not sufficient to constitute a delivery of personal property.
(*Good v. Curtiss*, 81 How. Pr., 4; *Shindler v. Houston*, 1 N. Y., 261-265; *Caulkins v. Hellman*, 47 id., 449.)*

APPEAL from a judgment in favor of plaintiff, entered upon the report of a referee, in an action on an account.

E. H. Prindle, for the appellant.

George A. Haven, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed, and new trial granted, costs to abide event, and referee discharged.

ISAAC MILLER, PLAINTIFF, v. JOHN S. BARBER AND
JAMES A. SCHEMERHORN, DEFENDANTS.

Fraud — Counter-claim — Evidence.

EXCEPTIONS ordered to be heard in first instance at the General Term.

This action was tried before the court and jury, and the jury found a verdict for the plaintiff. The defendant was given time to make a case and exceptions, with stay of proceedings, and it was ordered that a motion for a new trial on the exceptions be heard in the first instance at General Term.

The action was to recover damages alleged to have been sustained by the fraudulent acts and representations of the defendants.

The complaint averred that defendants, with intent to deceive

* See *Ham v. Van Orden*, ante, page 709.—[REP.]

and defraud the plaintiff, falsely and fraudulently represented to him that they had formed a company — The Union Patent Right Company — and had purchased the right to sell in a large number of counties, a patented article, known as “the hay-loading pitchfork;” that they had purchased very cheap; that the right was worth \$100 for each town, and would sell for that; that it was a very valuable machine and would be as indispensable to farmers as the mowing machine, and that the stockholders would realize large profits therefrom; that various individuals, known to the plaintiff as men of character and responsibility, were represented as having taken shares in said company, and given their notes for stock, and the stock book of said company was exhibited, on which appeared the names of such persons as subscribers for said stock. That relying upon said representations, and believing the same to be true, at the request and solicitation of said defendants, plaintiff gave his promissory note for \$500 for one share of stock in said pretended company, and received a certificate therefor signed by defendant Barber, as president, and Schemerhorn as treasurer, which said note was payable to said defendants. That defendants immediately transferred said note to a *bona fide* purchaser, and plaintiff was compelled to pay the same, and did not discover the fraud practiced upon him until after its payment; that said statements and representations were, at the time of making them, false and fraudulent, and the said stock worthless; that the notes, shares and pretended subscriptions for stock, were a fraudulent and a contrived scheme, got up to cheat and defraud. The answers were denials, and a counter-claim by the defendant Barber.

The court *held*, that this was not in a strict sense an action to rescind a contract and recover back money, but was properly in the nature of tort to recover damages for a loss sustained by the fraud of the defendants. It was not like the case of *Butler v. Livermore* (52 Barb., 570), and hence it was not an action in which a counter-claim was admissible, unless it was one arising out of the transaction set forth in the complaint, which the counter-claim put forth by the defendant Barber was not.

That this transaction of the defendants was joint. The representations made respecting the company, the stock and the pitchfork, were not only intended for the benefit of both, but the note

taken was given to them jointly, and, when sold, both participated in its avails; and hence they were co-conspirators, and the acts and sayings of either, in the progress of the common fraud, were admissible against both. (*Cary v. Hotailing*, 1 Hill, 311-316; *Jackson v. Timmerman*, 12 Wend., 299.)

M. M. Waters, for the defendant Schemmerhorn.

J. S. Barber, in person.

George N. Kennedy, for the plaintiff.

Opinion by JAMES, J.

LEARNED, P. J., and BOARDMAN, J., concurred in result.

Motion for new trial denied, and judgment directed for the plaintiff on the verdict, with costs.

JAMES RYAN, RESPONDENT, v. ANDREW WAVLE,
APPELLANT.

Case on appeal — Rule 43 — when not complied with.

APPEAL by defendant from an order denying a new trial, and from a judgment in favor of plaintiff.

The action was for slander spoken by defendant of plaintiff, in that defendant had charged the plaintiff with setting fire to defendant's barn, intending thereby to impute to plaintiff the crime of arson.

Plaintiff had a verdict. The defendant moved for a new trial on a case and exceptions before the Special Term. The motion was there denied, and judgment ordered for the plaintiff. From that order defendant appealed. After a hasty consideration of some exceptions taken in the case, the court say: The printed case used upon this appeal was unusually and unnecessarily voluminous — over 400 pages. It was filled with a vast quantity of irrelevant

and immaterial matter, and in direct violation of rule 43. All that was material could have been contained in twenty-five pages. Perhaps such a case may be regarded as the legitimate fruit of the last clause of rule 41. If so, the sooner that clause of that rule is stricken out the better. We were rejoiced to learn that the Court of Appeals, in a recent case, took occasion to signify its disapproval of the practice of taking the stenographic notes for a bill of exceptions. (*Jewell v. Van Steenburgh.*) Such practice casts unnecessary labor upon the appellate courts, and makes great and unnecessary expense in the way of printing to parties. Counsel should be required to observe strictly rule 43, and in all cases, when it is not adhered to, the case should be dismissed or sent back for resettlement at the expense of the attorney in fault. Motions to compel an observance of said rule, should be favored, and when granted, should be with costs personally against the attorney in fault.

M. M. Waters, for the appellant.

H. Ballard, for the respondent.

Opinion by JAMES, J.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, DEFEND-
ANTS IN ERROR, v. DANIEL CHRISTOPHER, PLAINTIFF IN
ERROR.

Perjury — Answer — allegation in, that defendant "says he denies."

Writ of error to the Court of Sessions in and for the county of
Tompkins.

The defendant was indicted, tried, convicted and sentenced to the State prison, in said Court of Sessions, for the crime of perjury. The perjury was alleged to have been committed in the verification of an answer interposed in an action brought upon two promissory

notes made by defendant. The complaint averred the making of the notes and their transfer to the bank (the plaintiff); its ownership; their presentment and demand for payment when the same became due; their non-payment; and that no part of said notes had been paid.

The answer to said complaint was as follows: First. The defendant, Daniel Christopher, comes into court by John A. Williams, his attorney, and in answer to the plaintiffs' complaint says that he denies each and every allegation therein alleged, except as herein admitted as follows, that is to say: He admits that he, on or about June 18th, 1870, made his promissory note for \$850, payable at First National Bank, Ithaca, to the order of R. De Witt Mann, and that the same was indorsed by R. De Witt Mann and A. C. Ditmar; that the plaintiffs are a banking corporation and discounted said note at or about the day of its date, and paid this defendant, the then holder thereof, the sum of \$500, and no more, and that no further or other sum has ever been paid by the plaintiff for or on account of said note. Second. The defendant says that he admits the execution of the second note described on the said plaintiff's complaint for the sum of \$1,000, made July 19th, 1870, to the order of A. C. Ditmar and indorsed by said Ditmar and R. De Witt Mann, payable at the First National Bank of Ithaca and delivered to said plaintiffs. And this defendant, in further answer to said complaint, says that the said last described note is fully paid and satisfied, and should be delivered up to him to be canceled.

The verification was that the same was "true of his own knowledge, except as to those matters therein stated to be upon his information, and as to such matters he believes it to be true."

In the indictment perjury is first assigned on the admission contained in the answer—upon the words that the plaintiff discounted said \$850 note, "*and paid this defendant, the then holder thereof, the sum of \$500, and no more*, and that no further or other sum had ever been paid by the plaintiff for or on account of said note;" and *secondly* upon the words in the *second* count of the answer, "that the said last described note [the \$1,000 note] is fully paid and satisfied."

On the question whether perjury could be assigned upon the

verification of the answer, JAMES, J., *held*, that in all cases the assignment of perjury, on which a conviction is asked, must be of matter material to the issue to be tried, and that materiality is always a question of law; that the words in the first count designated as untrue contained no answer to the complaint; were not responsive to any allegation therein; did not help to form any issue; were not a denial, but simply a statement of what defendant admitted, and hence were wholly immaterial; that no issue was formed to the first count of the complaint; that the answer contained no denial, as the defendant only *said* he denied what he did not admit, and that this was a mere affirmation that he denied. Merely saying he denied was one thing; a direct and positive denial was quite another. (*Arthur v. Brooks*, 14 Barb., 533; *Blake v. Eldred*, 18 How., 240.)

That by the second count the answer contained a separate and distinct allegation that the \$1,000 had been paid; formed a direct issue with an allegation in the complaint upon a material point; and that the word "*says*" was not there used as an assertion of what defendant had done or was about to do, but was the assertion of a fact which, if true, constituted a defense to the note; that the allegation was therefore material, and perjury could be assigned thereon.

That as a general verdict of guilty was rendered in the case, the evidence given upon the trial could be properly applied to said second count, and hence the conviction could be sustained.

LEARNED, P. J., concurred in the result, without being confident that perjury might not be committed when the allegation of an answer is "the defendant says that he denies."

H. Ballard, for the plaintiff in error.

S. D. Holliday, for the defendants in error.

Opinions by LEARNED, P. J., and JAMES, J.

Present—LEARNED, P. J., and JAMES, J.

The conviction and judgment of the Sessions affirmed, and the record remanded to the Court of Sessions of Tompkins county, the court in which the prisoner was tried and convicted, and the prisoner ordered to appear before said Court of Sessions at its term to be held on the 9th day of June, 1875, and said court directed then and there to pronounce sentence and order its execution.

GERTRUDE E. ELWOOD, ADMINISTRATRIX, ETC., PLAINTIFF,
v. THE NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY, DEFENDANT.

Contributory negligence.

MOTION to set aside a nonsuit and for a new trial.

Defendant's passenger train stood at defendant's depot in front of a platform for the use of passengers. The deceased (plaintiff's intestate) approached from the opposite side without the knowledge of defendant or its employes, got upon a car from the side opposite the depot platform, found the car door locked, got off the platform of the car on the side from which he had approached it, and undertook to walk between the tracks to the end of the train without looking behind him, was struck by a working train approaching him from behind, and killed. *Held*, that the negligence of the intestate contributed to the injury; that the fact that the working train did not give the signal required by statute on crossing a street before reaching the depot, was not an act of negligence toward the intestate, who was not on the street or where he had any business to be.

Amasa J. Parker, for the plaintiff.

Samuel W. Jackson, for the defendant.

Opinion by JAMES, J.

LEARNED, P. J., concurred.

Motion for new trial denied, and judgment ordered for defendant.

JOSEPH N. GREENE, RESPONDENT, v. JOHN W. THOMAS,
APPELLANT.

APPEAL from a judgment in favor of plaintiff, entered on the report of a referee.

The plaintiff entered into a contract with Cornell University to erect and finish a certain building. Subsequently he made a sub-contract with the defendant, by which the defendant, for a certain fixed sum, was to do all the carpenter work, find materials therefor, and do the painting, etc., in said building. The defendant commenced the work, and, after he had done a part thereof, abandoned the same without good cause. The plaintiff completed the work and sued the defendant for damages for the breach of the contract. The referee before whom the cause was tried allowed the plaintiff, among other things, \$900 for his services in superintending the completion of the carpenter work. The only objection raised on this appeal was to this item of \$900.

The court at General Term *held*, that as, if the defendant had fulfilled his contract according to the agreement, the plaintiff would not have been obliged to devote any of his own time to the superintendence of the workmen doing the carpenter work; and that as the referee had allowed this item to the plaintiff, it must suppose that he found the superintendence to be necessary, and it was therefore a proper item to be allowed, and the judgment should be affirmed.

George F. Danforth, for the appellant.

B. A. Benedict, for the respondent.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

JOHN O. WHITAKER, RESPONDENT, v. MILTON D. WHITAKER, APPELLANT.

Payment — when receipt of note of third person is not.

APPEAL from a judgment in favor of plaintiff, entered on the report of a referee.

The plaintiff made a written contract to sell to the defendant certain land, at a certain price, to be paid at specified times. On the day of the date of the contract, the plaintiff received from the defendant the note of a third person, indorsed by the defendant. And the plaintiff indorsed upon the contract, as received thereon, this note. There was no agreement other than this, that the note should be taken in payment. The note was not paid or protested. The plaintiff sued for the balance due on the contract, being the amount of the note. There was no agreement in the written contract that the note should be taken as a part of the purchase-money. The contract provided for money payments. The General Term held, that the note having been taken on a precedent debt, was not to be deemed to be taken in payment, unless on positive proof to that effect.

The plaintiff having offered to return the note on the trial, the court held this to be sufficient, citing *Nichols v. Michael* (23 N. Y., 267).

T. & A. Moore, for the appellant.

Alex. Cumming, for the respondent.

Opinion by LEARNED, P. J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs.

ANDREW S. WELLER, RESPONDENT, v. JOSEPH H.
TUTHILL, APPELLANT.

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

This action was brought to recover the sum of \$500, paid by the plaintiff to the defendant, who had contracted to see that a half share of the Ellenville Company stock should be got for plaintiff, if he would send to him or the treasurer a check for \$500. Such check was sent by plaintiff to defendant, who directed it to be given to the treasurer, and by the treasurer credited to the defendant, in part payment of defendant's stock subscription. The defendant did not transfer any stock to plaintiff, but continued to control and manage it as his own thereafter. Defendant had and used the stock, so paid for by plaintiff, and plaintiff never received any consideration for such payment. Defendant, who was the president of the company, never gave plaintiff any notice that he, defendant, had got the stock for him. The General Term *held*, that these facts made a much stronger case than that of *Churchill v. Stone* (58 Barb., 233), and that plaintiff was entitled to recover.

John Lyon, for the appellant.

C. A. Fowler, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment affirmed, with costs

ELIZABETH F. CAGGER, AS GUARDIAN OF INFANT CHILDREN,
AND ANOTHER, RESPONDENTS, v. MARTINUS LANSING,
APPELLANT.

Ejectment — Judgment — conclusive as to matters adjudicated — Writ of possession — laches.

APPEAL from a judgment in an action of ejectment, entered upon the verdict of a jury directed by the court. The recovery was of certain lands in Rensselaer county by the plaintiffs as the heirs of the late Peter Cagger.

The answer of the defendant was merely a denial and the statute of limitations.

It was proved on the trial that in February, 1864, William P. Van Rensselaer recovered a judgment in ejectment against the defendant for these lands, upon which a writ of possession was issued in May, 1864. In August, 1864, Van Rensselaer conveyed to James Kidd and Peter Cagger. In December, 1864, Kidd released his interest to Cagger. Cagger died intestate in July, 1868, leaving the plaintiffs his heirs at law. On the 26th of July, 1871, the plaintiffs made a demand upon the defendant for the possession of the premises, which was refused.

This action was brought by Elizabeth F. Cagger, the natural guardian of Peter Cagger's infant heirs, and by Mary C. Cagger, his only adult heir.

The defendant claimed that Cagger had no claim except as mortgagee, and that one Church was the real party in interest.

Upon these facts the court ordered a verdict for the plaintiffs.

The court at General Term held, that the defendant was concluded by the judgment recovered in favor of Van Rensselaer. (2 R. S., 309, § 36; *Beebe v. Elliott*, 4 Barb., 457; *Bennett v. Couchman*, 48 id., 73.) That it was also conclusive as to the question of Cagger's title. (*Van Rensselaer v. Barringer*, 39 N. Y., 9; *Van Rensselaer v. Dennison*, 35 id., 393.) That mere neglect to enforce the right by a writ of possession, unless the statute of limitations had run, did not invalidate the judgment. (*Jackson v. Haviland*, 13 Johns., 229.) The court also cited *Cagger v. Lansing* (43 N. Y., 550).

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Anson Bingham, for the appellant.

Samuel Hand, for the respondents.

Opinion by BOARDMAN, J.

Present — JAMES and BOARDMAN, JJ.

Judgment affirmed with costs.

MURTHA FLOOD, RESPONDENT, v. CALEB W. MITCHELL,
APPELLANT.

Evidence — what draft of contract inadmissible as evidence of agreement between parties.

APPEAL from a judgment in favor of plaintiff, entered on the verdict of a jury.

The action was brought for work done in building or grading a race track. The answer denied the allegations of the complaint, and set up a contract by which plaintiff agreed to finish the track; alleged that he had neglected to do so, and claimed damages therefor. The court *held*, that the draft of a contract, unexecuted, drawn up in accordance with what the person drawing it supposed to be the agreement between the parties, but which did not contain their language, was not admissible in evidence. That the cases of *Halsey v. Sinsebaugh* (15 N. Y., 485), and *Russell v. H. R. R. Co.* (17 id., 134), did not authorize such evidence.

The jury found in favor of the plaintiff for the full amount claimed.

A. Pond, for the appellant.

L. B. Pike, for the respondent.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., and BOARDMAN, J.

Judgment affirmed, with costs.

PROCEEDINGS

HAD AT A

CONVENTION OF THE JUSTICES OF THE GENERAL TERMS OF THE SUPREME COURT,

Held Pursuant to Chapter 181 of the Laws of 1878.

At a meeting of the justices of the Supreme Court designated to hold the General Terms thereof, held at the Capitol, in the city of Albany, on the 1st day of June, 1875, at 12 m. of that day, in accordance with the provisions of chapter 181 of the Laws of 1875, it was moved and carried, that Justice Mullin of the Fifth District be appointed chairman of the meeting, and John R. Brady of the First District be appointed secretary thereof.

The following justices were present: Justices Mullin, Boardman, Davis, Tappen, Learned, Bockes, E. D. Smith, Daniels, Brady, Gilbert.

On motion of Justice Gilbert, it was resolved, that the members of the General Terms present proceed to ballot for the selection of a reporter of the decisions of the Supreme Court, in conformity to the act before mentioned.

The following was the result of such ballot: Isaac Grant Thompson received four votes, and Marcus T. Hun received six votes. Thereupon Justice Learned moved that Marcus T. Hun be appointed such reporter, which motion was carried unanimously. His appointment in writing was thereupon prepared and signed by all the justices present and hereinbefore named. Justice Daniels thereupon offered the resolutions attached hereto, and they were put and carried. Justice Learned thereupon offered the resolutions attached hereto, and they were put and carried. Thereupon Justice Tappen moved that the secretary of the meeting be authorized to file in the office of the Secretary of State the papers and proceedings of the convention, required by the act aforesaid.

It was thereupon resolved that the convention adjourn *sine die*, and the resolution was carried.

J. MULLIN,
Chairman.

At the Capitol, ALBANY, June 1, 1875.

JOHN R. BRADY,
Secretary.

Justice Daniels offered the following resolutions :

Resolved, That the justices of the General Term of each judicial department, shall deliver copies of their opinions to the reporter of the Supreme Court and to counsel applying for the same; and that the copies delivered to the reporter be retained by him and delivered only to his successor in office; and that such only of said opinions be reported at large as the public interests may appear to require, and that the same be exclusively reported in the series of reports compiled by him and published under his authority; and in citing or referring to decided cases, counsel be and they are hereby respectfully requested to cite and refer to them only as they may be found in the said series of reports.

Resolved, That counsel receiving copies of such opinions be and they hereby are requested to withhold the same from publication, to the end that only such of them may be reported as shall be published under the sanction and authority of the Supreme Court reporter.

Resolved, That the legislature of this State be and it is hereby respectfully requested so to amend chapter 267 of the Laws of 1859, chapter 260 of the Laws of 1860, and chapter 486 of the Laws of 1871, as to entitle the graduates from the law schools or colleges, mentioned in said acts, to only an allowance of an equal period for the time spent in attendance in either of the said schools or colleges upon the terms of clerkship prescribed for other students at law by the rules of the Court of Appeals for admission to the bar of the several courts of this State, and requiring such graduates before they shall be entitled to apply for admission to practice as attorneys and counselors, to complete the term of clerkship prescribed by said rules, and to be examined in the same manner as other applicants are required to be examined by said rules.

Resolved, That the preceding resolution, or a copy thereof, attested by the president and secretary of this convention, be transmitted to the presiding officer of the senate and assembly at the next session of the legislature of this State.

Justice Learned offered the following resolutions :

Resolved, That when any special meeting of the judges of the Supreme Court designated to hold the General Terms thereof, shall be held under the act entitled "An act to appoint a reporter of decisions of the Supreme Court," passed April 22, 1875, the same shall be held at the Capitol in the city of Albany, or at any other place to which such meeting shall be adjourned.

Resolved, That such special meeting may be called by the presiding justice of any department by written notice served on each of the said justices, either personally or by mail, at least two weeks before the day of meeting.

Resolved, That such special meeting may be called either for the purpose of filling a vacancy or for the purpose of removing the reporter for good cause shown, and that the object of the meeting and the time and place thereof, shall be stated in the notice thereof; and that whenever the object of the meeting shall be to consider the removal of the reporter, a copy of the notice and of the specifications of the charges or grounds on which such removal is sought, shall be served on the reporter at least ten days before the meeting of the judges; and such order shall be taken thereon at such meeting as the judges shall then direct.

Resolved, That the reporter be requested to cite the volume and page of authorities in the body of the printed volume instead of citing them at the foot of the page.

The resolutions were unanimously adopted.

Filed in office of Secretary of State, June 1st, 1875.

PROCEEDINGS

IN THE

SUPREME COURT, FIRST DEPARTMENT,

IN REFERENCE TO THE

DEATH OF HON. E. P. COWLES,

LATE JUSTICE OF SAID COURT.

On Monday, January 4th, 1875, the death of ex-Judge EDWARD P. COWLES was announced, and the court adjourned out of respect to his memory. The following are the proceedings which took place on the occasion :

Mr. Stoughton said : May it please the court, I desire to call the attention of your honors to the death of the Hon. EDWARD P. COWLES, who at one time sat upon this bench as a member of your honors' court. It would seem to me, and to some of my brethren of the bar, and I trust will not be regarded as unseemly by the court, that it is not inappropriate, upon such an occasion, to move that the court, out of respect for the memory of our departed brother, should adjourn with such a memorandum upon its minutes as the court sees fit to direct to be made. Judge COWLES was well known, undoubtedly, to all of your honors, as he was very generally known to the bar. It may not be inappropriate for me to state some facts connected with the history of his life. He graduated at Yale college, in the class of 1836. He commenced the study of the law with the Hon. Ambrose L. Jordan, a very distinguished lawyer in Hudson, in this State, and there he remained until January, 1840, when he was admitted to the bar. He continued to practice in Hudson until 1853, when he removed to the city of New York. He occupied, I think I may say, a high place in the profession before he came here. He was very well known, not only locally, but generally, as a lawyer of distinction, as an able

man, as a worthy and upright man ; and when he came here, after practicing for something like two years, a vacancy having occurred upon this bench by the death of the Hon. HENRY P. EDWARDS, who, I believe, was then the presiding judge of this court, Judge COWLES was appointed in his place to fill that vacancy. He occupied this bench, as a member of the court, during the year 1853, and I think, may it please your honors, I can say that he occupied that high place to the entire satisfaction of the bar, and, if such a phrase is appropriate in reference to the estimate of a judge, of the public. When he came to this city he took a high and honorable rank with the able, and indeed I may say with the ablest lawyers. It was my good fortune to know him well ; I have argued causes before him when he sat upon the bench ; I have been associated with him at the bar, and knew him well in social life. As a judge he was a firm and just man, delivering his judgments and forming his conclusions without fear, favor or the hope of any other than that reward which every upright judge gets within and of himself. In social life he was a true friend, ever ready to sacrifice much, if needs be, in that relation ; a warm-hearted and kind man, faithful, I think, to all the duties devolving upon him. As an associate at the bar he was able — he was useful — not speaking much when he addressed the court, but always speaking well and to the point, bringing, as he brought to his colleagues on the bench, to his colleagues at the bar, the aid of a strong, vigorous understanding, and learning that made him more than ordinarily competent to deal with questions as they arose. Warm and, as I before said, earnest in his advocacy, and yet withal modest and unassuming.

He died, may it please your honors, in Chicago, on the second of December last, on his return from California, to which place he had gone from this city, having left here, I think, on the twenty-third of October. It happened that just before he left here he was applied to by a gentleman, a member of his class in Yale of 1836, who asked him to furnish — as it was the desire of the class to have the material which would enable them to form an estimate of the history of each member of it — some account of his life. With your honors' permission, I should like to read two or three sentences. It illustrates his character for modesty so well — it illustrates so well the nature of the man, that with your honors' permission I will read what, perhaps, I won't say was the last written by him,

but the last that will ever meet the public eye. He says, referring to this request which had been made: "My dear sir, in accordance with what you tell me has been the expressed desire of the class of Yale of 1836 that some account of the life of its several members since graduation be gathered up for the joint benefit and gratification of the survivors, I give you a brief epitome of my own. It will needs be brief, for it has not been a very eventful one, certainly not unless as it appears to myself and from my own stand-point, and while it has not been an idle one, yet there is again little concerning it of great interest except to myself and those most nearly allied to me. Early in 1837 I began my law studies and training at Hudson, N. Y. That gifted and accomplished lawyer, the late Ambrose L. Jordan was my Gamaliel. In due time, January, 1840, I was admitted to the bar and began my professional life at that place, and not long after was joined as law partner by my younger brother, David S. Cowles, who subsequently, and in May, 1863, fell in battle, leading a column of attack upon the enemy's works at Port Hudson, La., as true a Christian gentleman and soldier as perished in the war of the great rebellion of 1861. I mention his name here, since most of my particular friends of the class of 1836 knew and will remember him while one of the class of 1839. I remained in practice with my brother at Hudson, until May, 1853, and then removed to the city of New York, where I have since remained, having during a portion of that time been one of the justices of the Supreme Court of the State."

At the close of this we have an expression, may it please your honors, and I beg leave to read it, of the feelings which animated him, feelings of gratitude for what he conceived to have been a life perhaps as happy as mortal can hope for here. He says: "Since 1836 I have enjoyed with rare intervals, to a most unbounded degree, that great boon, health, and in my domestic family circle the grim enemy, death, has never invaded. Profoundly grateful for such an unusual blending of blessings, I may be permitted to truly say my days have had their brightness and life its joys."

Now, may it please your honors, I desire to call your attention for a moment or two to another phase, if I may so speak, in his character. Without being a partisan in the unpleasant sense, he was, nevertheless, earnest and ardent in his political convictions and pursuits, but there was blended with that ardency and earnest-

ness great good sense, and he dealt with broad questions in a wide and deep way, with a judgment which I think was most excellent, and it is well illustrated, may it please your honors, in a speech which I find he delivered before the Chamber of Commerce upon the occasion of the reception of Admiral Farragut in this city in 1864, before the close of the war, the purpose being also to procure the subscription of a fund to be given to the admiral in testimony of his great national services upon the sea. Judge COWLES delivered an address before the Chamber of Commerce, in which, almost prophetically, having spoken of the outrages upon the sea to which our commerce had been subjected, he told us then, in December, 1864, what has finally happened many years since, in the settlement by Great Britain of those claims. And perhaps your honors will be kind enough to permit me to read one sentence which discloses what I conceive to be a remarkable judgment formed at that time. He says, speaking to the president of the chamber: "Sir, perhaps it is not for us now to seek to penetrate the veil which conceals the future from our view. But it may be permitted us to believe that some time hereafter, when the rebellion shall have been suppressed, as in time it will be, and when its suppression shall have been followed by the restoration of the Union in all its integrity, as under the blessing of God it is our unalterable purpose that it shall be, our cousins upon the opposite side of the Atlantic may then be invited by our government to a friendly conference over the devastation of our commerce, caused by these illustrations of their duties, as a neutral power during our grapple with a gigantic rebellion. It is not, perhaps, for us now to say what ground our government will then assume, but I have an idea—it may be a fanciful one—that it is at least among the things possible that Great Britain may be invited in a friendly spirit to foot the bill for all these losses."

That judgment, as we have seen, has been realized in the most remarkable trial the world has ever known.

Our brother, may it please your honors, was in no sense a narrow man, neither in heart or mind, and it does seem to me, and it has seemed to my brethren of the bar, that it would be the pleasure of your honors, out of respect to the memory of our deceased brother, to direct an adjournment, which I now move; also, that such an

entry as your honors see fit may be made, or directed to be made, upon the minutes, together with the cause of adjournment.

REMARKS BY JUDGE PIERREPONT.

Mr. Pierrepont said: Your honors, when a lawyer has reached the exalted place of a judge of the Supreme Court of the State of New York, and has held that place with honor to himself, with satisfaction to his brethren on the bench, to the bar and to the whole community, it seems fit that upon the announcement of the death of such a man some appropriate notice should be taken by the court of which he was once a member. I rise, not to add to what my friend Stoughton has so appropriately and so beautifully said, nor to detract one word from all that he has here pronounced in eulogy upon our deceased friend. I remember Judge COWLES earlier than my friend remembers him. When I was a boy in Yale college, he was at the same time in Yale college, but of an older class. I knew him by sight, as those younger know those in the class above by sight, but he did not know me. I never saw him from the time he left the college and I remained in it, until I saw him upon the bench of this court. I was greatly struck with the change in the man's physical appearance, from the young student to the corpulent judge. I became very well acquainted with him while on the bench, and our acquaintance and our friendship remained until the day of his death. His death was sudden to me — sudden perhaps to us all. I was in court before Judge VAN BRUNT, moving off a cause in which he had retained me to aid in the trial, and the motion was based upon the ground which his brother then gave me of a telegram from Chicago that he was on his way home, and was detained by a lameness in his foot. For that reason the cause was put off, and on returning to my office I received a telegram that he was dead; so sudden as that was the announcement to us. Your honors have listened, and I think with pleasure, to the very modest account which Judge COWLES gave of himself, recently, to his class, most beautiful in its modesty, charming in its simplicity, and the prophetic statement which he made in the speech which my friend has read from in relation to the claims against Great Britain, of what would be done with them and what would be their final result, showing a sagacity and forecast which were truly remarkable.

I did not rise to detain your honors with a speech, but I rose to say that I would neither add to nor detract from what our friend has said of our departed brother, and to second the motion he has made.

REMARKS OF HON. HENRY E. DAVIES.

Judge DAVIES said: If your honors please, it certainly will not be inappropriate to add one word to what has been so beautifully said, by the friends who preceded me, in reference to the character, talents and judicial standing of our deceased brother.

My first acquaintance with Judge COWLES was in 1855, when he occupied a seat on this bench. He sat in the General Term of this court for the terms held in May, September and November, 1855, and the minutes of the court and the reports of its proceedings will testify to his ability, his intelligence, his capacity, and his sound legal principles.

While Judge COWLES occupied a seat upon the bench, it became my fortune to come in — what the public considered — collision with him in reference to the case of *The People on the relation of Davies v. Cowles*. He met that contest in the same spirit with which, I hope, I met it myself — the spirit of a gentleman — with courteous propriety, with an earnest desire to know only what the right was, and to abide by it. That intercourse resulted in a very warm and lasting friendship between Judge COWLES and myself, which continued to the day of his death, and the confidence I reposed in him, I believe, was reciprocated by himself.

I have known him to be a true gentleman, an honorable, chivalric man, a profound lawyer, a true and trusted friend.

I rise merely for the purpose of asking that the court will make a minute upon its records, and, out of respect to his memory, will now adjourn.

REMARKS OF HON. NOAH DAVIS.

Judge DAVIS said: The court will certainly, with great pleasure, note upon its records this tribute of respect to the memory of Judge COWLES. Our own personal knowledge of that gentleman, so far as two members of the court are concerned, is such as to justify the court, irrespective of the fact of his having been formerly a member of the court himself, in granting this motion. It is due to his memory it should be granted, because of his former position

as a member of the court, but it is still more due because of his honorable relations to the court afterward. As judge he discharged his duties faithfully and well. But little opportunity was afforded him during the few months he occupied a seat upon the bench to display his abilities as a judge, which opportunity would undoubtedly have developed, but at the bar we have no hesitation in saying he was at all times honorable, courteous, polite and capable. We grant this motion, therefore, as I said, with great pleasure, because we deem it due when such a lawyer dies — due to his family as well as to the members of the bar and his memory — that the court should unhesitatingly pay the tribute of respect where the character of the deceased was such as that of Judge COWLES, in order by the public recognition of the value of such a character to set an example to the younger members of the bar, leading them to endeavor to attain and maintain the same high and honorable relations which he always occupied.

The court will now adjourn.

The court will, in addition, prepare a tribute of respect in proper form, to be entered upon its minutes, a copy of which will be furnished, by direction of the court, to the members of Judge COWLES' family; and it of course desires to express to the counsel who have made the motion its gratification at the admirable manner — the very eloquent manner — in which it has been presented; and also to express its very hearty concurrence in the estimate which the gentlemen have placed upon the character of the deceased.

The following memorandum was prepared by the court and entered upon its minutes:

In Supreme Court, General Term, January 4, 1875. Noah Davis, P. J., John R. Brady, J., and Charles Daniels, J.

The court directs this minute to be entered upon its record as a tribute of respect to the memory of the late Hon. EDWARD P. COWLES, formerly a judge of this court, and a distinguished member of the bar.

Judge COWLES became a member of this court in February, 1855, and sat as an associate judge in the General Terms of May, September and November of that year. The minutes of the court and the reports of cases decided during that time, attest his industry,

ability and sound legal knowledge. His services on the bench were brief, but sufficient to show that he possessed qualities that would have made him a useful and able judge. He was distinguished at the bar by the fidelity of his application to every duty, the clearness of his perceptions, his directness and perspicuity in argument, and the honesty of his efforts to bring the mind of the court to what he believed to be the truth and justice of the cause.

His marked courtesy to the bench and to his professional brethren made it a pleasure to listen to his arguments. The happy example of his professional life justly commends itself to the emulation of the younger members of the bar.

In private life the known integrity of Judge COWLES, his genial manners, his modest demeanor, and his good faith in all things, won to him the confidence, respect and personal affection of all with whom he came in contact.

The just and eloquent tributes to his memory and virtues, which have been pronounced at the bar, receive, as they well deserve, the warm approval and concurrence of the court.

The court directs that, after entering this memorandum at length in the minutes, the clerk transmit a certified copy of the same to the family of the deceased.

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ASSESSMENTS—1857, chap. 446, § 7—*when publication required by, is sufficient.*] 1. Under section 7 of chapter 446, Laws of 1857, it is sufficient if two days shall intervene between the publication of the notice, thereby required, and the passage of the resolution. **MATTER OF AGNEW**..... 435

2. — 1872, chap. 580—*power of court to vacate assessment for failure to publish notice.*] Under the provisions of chapter 580, Laws of 1872, providing that "no assessment for any local improvement * * * shall hereafter be vacated * * * by reason of any omission to advertise, or irregularity in advertising any ordinance, resolution, notice or other proceedings," etc., this court has no power, except in cases of fraud or repavement, to vacate an assessment for a failure to publish the notice of the final passage of the resolution authorizing the improvement required by section 7, of chapter 446, Laws of 1857. *Id.*

3. — *New York City—publication.*] Chapter 137 of the Laws of 1870, does not require that a resolution for the repavement of a street in the city of New York, should be published in more than one newspaper.

MATTER OF CONWAY v. MAYOR..... 43

— *The power of the legislature to apportion assessment of taxes.*

See **MATTER OF SACKETT STREET**..... 92

— *Publication of ordinances and resolutions of board of aldermen required by chap. 187, 1870, § 7—when must be made.*

See **MATTER OF LEVY**..... 501

— *Right of city to assess lots fronting on streets dedicated and accepted for purposes of streets.*

See **MATTER OF INGRAHAM**..... 495

— *Reference—power of court to order, on application to vacate assessment, made under chapter 312, 1874.*

See **MATTER OF BOHM**..... 558

— *Chap. 312, 1874—when application to vacate assessment cannot be made under.*

See **MATTER OF FURNISS**..... 694

ASSIGNMENT—*Parol assignment of debt—when valid.*] 1. A parol assignment of a debt, made upon a good consideration, is valid, both at law and in equity. **DOREMUS v. WILLIAMS**..... 458

2. — *Power of court of equity to compel assignor to execute written assignment.*] In a proper case the court will compel the assignor to execute a written instrument of assignment; but his failure so to do is no defense to an action, brought by him upon a promissory note, given by the assignee in consideration of the assignment to him of the claim. *Id.*

— *Assignees of contract for sale of land—rights and interests as between each other.*

See **PLYMPTON v. BOEHME**..... 396

— *Of claim by bankrupt—when valid.*

See **MCDONNELL v. BAUENDAHL**..... 265

— *Of mortgage to escape taxation—when title passes by, and court will not help party get it back.*

See **COX v. WIGHTMAN**..... 790

ATTACHMENT — *Non-residence — affidavit not required to show non-residence positively.*] 1. Upon an application for an attachment on the ground of the non-residence of the defendant, the affidavit is not required to state in positive terms that he is not a resident of the State. It is sufficient when that conclusion is the only one which can be consistently drawn from the facts set forth in the affidavit. *MAYOR v. GENET* 487

2. — *Non-residence — when sufficiently shown by affidavit.*] Where, on an application for an attachment, an affidavit was presented showing that the defendant had been indicted and convicted of obtaining, by false pretenses, the money to recover which the suit was brought; that after conviction and before sentence he escaped, and, though the most strenuous efforts had been made to discover his whereabouts, he still continued concealed: *held*, that it sufficiently appeared that he was a non-resident, and that an attachment was properly issued. *Id.*

3. — *Domicile and residence — distinction between.*] Domicile is the habitation fixed in any place with the intention of always staying there, while residence is much more temporary in its character. *Id.*

4. — *When may issue in action for recovery of unliquidated damages.*] Attachments may issue in action on contracts for the recovery of unliquidated damages, when a proper disclosure of the grounds of the claim supplies practicable means for determining its amount. *UNITED STATES v. GRAFF* 634

5. — *Personal property, tangible in its character, can only be attached by the sheriff's taking it into his custody.* *Id.*

6. — *A safe in a trust company's vault is not within the protection which the law affords to a person's dwelling-house against the execution of civil process.* *Id.*

7. — *Affidavit for, must state a cause of action — mere recital of facts insufficient.*] The affidavit on which an attachment is granted must show that a cause of action exists in favor of plaintiff. It must state the facts out of which the cause of action arose.

A mere recital of facts without a direct statement of their existence, is insufficient. *MANTON v. POOLE* 638

8. — *Code, § 236 — right of attaching creditor to examination of defendant's debtor under.*] An order requiring a debtor of the defendant to appear and be examined, made on account of his refusal to give the certificate required by section 236 of the Code for the benefit of an attaching creditor, will not be vacated on an affidavit of such debtor stating that the funds in his hands are held in trust and cannot be applied in payment of the plaintiff's debt. The attaching creditor is not bound to take the statement of the debtor as to the character in which the money is held by him, but is entitled to the examination provided for by the Code.

BAXTER v. MISSOURI, KANSAS AND TEXAS R. Co 630

— *Omission to serve summons within thirty days after allowance of — effect of, as to third persons.*

See SIMPSON v. BURCH 815

AWARD — *Construction of — costs.*] An appeal having been taken to the County Court from a judgment of a justice of the peace, the case was, by consent of the parties, submitted to an arbitrator, who awarded to the plaintiff's intestate "the sum of twenty-five dollars, and the costs, if any, recovered by her before Charles G. Day, justice." *Held*, that the plaintiff was entitled only to such costs as were owing to the deceased at the time of the award, and that as the costs had already been paid, they could not be recovered a second time upon the award. *WILLEY v. SHAVER* 797

BANKRUPT — *Assignment of claim by — when valid.*] One Lee, after he had been declared a bankrupt, assigned to the plaintiffs the claim against the defendants, upon which this action was brought; no assignee in bankruptcy was ever appointed, and the proceedings were subsequently discontinued. *Held*, that the assignment was valid. *MCDONNELL v. BAUENDAH*... 265

BANKRUPTCY — *Omission of name of creditor in debtor's schedule — effect of, on discharge of bankrupt.*] 1. The omission from the schedule of the debtor,

BANKRUPTCY — Continued.

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of the name or claim of a creditor, does not invalidate the discharge of the debtor in bankruptcy, unless it be shown to have been omitted fraudulently.

PLATT v. PARKER 135

2. — *Effect of, on title of bankrupt to real estate — when equitable title remains in bankrupt after conveyance to assignee.*] The defendant conveyed to the plaintiff an alley, reserving to himself the right to use the same, in common with the plaintiff, so long as he should continue to own the adjoining lot; subsequently defendant was, on his own application, declared a bankrupt, and conveyed all his property to his assignee, who afterward reconveyed the same to him, the proceedings in bankruptcy having been discontinued. *Held*, that the defendant remained the actual owner of the property, in equity, notwithstanding his bankruptcy and the conveyance to the assignee, and that his easement in the alley was not terminated thereby.

COLIE v. JAMISON 284

— *When debt not discharged by bankrupt's discharge.*

See REID v. MARTIN 590

BEQUEST — What is a sufficient description of beneficiary — latent ambiguity — parol evidence admissible to explain.

See TRUSTEES v. COLGROVE 363

— *Gift over to second legatee — when valid.*

See BELL v. WARR 406

BILL OF EXCHANGE — Acceptance of, induced by fraudulent concealment of facts.] 1. In an action for fraudulent concealment by which the plaintiffs were induced to accept a bill of exchange, it was *held*, that if a bill of lading was exhibited at the time of the presentment of the bill of exchange for acceptance, and the plaintiffs were thereby induced to believe that the bill of exchange was secured by certain cotton mentioned in the bill of lading, and if, at the time of such presentment, defendant knew that the cotton had not been paid for and that steps were being taken to reclaim it, and such facts were concealed from plaintiffs with the intention of inducing the acceptance of the bill of exchange, upon the faith of the security of the cotton, and the bill of exchange was accepted upon the faith that the bill of lading was a valid bill for the cotton described in it, the plaintiffs were entitled to recover.

MARCH v. FIRST NAT. BANK 466

2. — *Refusal of drawee to pay in full or redeliver bill to payee — liability of drawee.*] When the dealings between the holder and the person on whom a bill of exchange is drawn, show that the understanding between them is that the latter is to pay thereon the amount in which he is indebted to the drawer, and that the bill of exchange, with an indorsement thereon of the payment of such amount, is to be held by the drawee as a voucher for such payment: *held*, that by refusing to deliver the bill of exchange to the payee, the drawee does not make himself liable as an acceptor thereof under the provisions of 3 Revised Statutes (5th ed.), page 68. Whether a builder's order be a bill of exchange or not, *quære*. **GATES v. ENO** 96

BILL OF PARTICULARS — Refusal of referee to order, not reviewable.] Upon the trial the referee refused to require the plaintiff to furnish a bill of particulars. *Held* (1), that this was a matter of discretion, and, in the absence of an abuse of such discretion, it was not reviewable; (2), that defendants, when the claim was presented, could have required it to be made more precise and particular before accepting or rejecting it.

MATTER OF WELLER v. WELLER 195

BONA FIDE PURCHASER — Of stolen coupons — rights of.

See EVERTSEN v. NAT. BANK OF NEWPORT 692

BOND OF INDEMNITY — Judgment against obligee only prima facie evidence — what may be shown in action upon.] As between the obligee and obligor, in a bond of general indemnity against claims or suits, a judgment against the obligee is only *prima facie* evidence; and in a suit upon such obligation, the obligor may show collusion between the plaintiff and defendant in the original action, or that his principal had a good defense to such action, which he neglected or refused to interpose. **CHAPIN v. THOMPSON** 779

BONDHOLDERS — *When action may be maintained by, to restrain railroad company from diverting property covered by mortgage.*

See WEETJEN v. ST. PAUL AND PACIFIC R. R. Co. 529

BONDS — *How taxed.*

See PEOPLE EX REL. TROWBRIDGE v. COMRS. OF TAXES 595

BOOKS — *Inspection of — for what purpose not allowed — Services rendered in keeping — how value of, proved.*

See MINER v. GARDINER 133

BRIDGE — *When town may maintain action for injury to.*

See TOWN OF PIERREPONT v. LOVELASS 696

BROKER — *Duty of, to tender gold sold for principal, seller's option, within time limited by contract of sale — Measure of damages.*] The defendants, acting as plaintiff's brokers, having purchased for him \$40,000 in gold, he entered into two agreements with one Meyberg, by one of which he sold \$20,000 to be delivered, at his option, between the first and twentieth of February; and by the other he sold \$20,000 to be delivered at Meyberg's option, between the twenty-first of January and the twenty-first of February. The contracts signed by Meyberg were sent by the plaintiff to the defendants, with a letter requesting them to deliver the amounts to the buyer. An agent of Meyberg called on the thirtieth of January and demanded the \$20,000 deliverable at his option, which was accordingly delivered to him. The agent at the time stated that he had the other contract in his possession. The defendants did not tender the \$20,000 sold under the other agreement during the time specified. In an action brought to recover the damages sustained by the loss of the opportunity to sell the gold, *held*, that it was defendants' duty to have made the tender, and that they were liable to the plaintiff for the damages sustained by him from their failure so to do.

The plaintiff was first informed of their failure on the third of April. *Held*, that it was his duty to at once take the necessary steps to secure himself against further loss; and that the defendants were not responsible for any loss sustained by him in consequence of the subsequent fall in the price of gold.

SPEYER v. COLGATE 622

BUILDER'S ORDER — *Whether builder's order is bill of exchange or not, quære.*

See GATES v. ENO 96

CANAL CLAIMS — *Filing of — 1866, chap. 888; 1870, chap. 321.*] By chapter 321 of the Laws of 1870, the canal appraisers were authorized to hear and determine all claims against the State, etc. All claims for damages which should have accrued more than one year prior to the passage of the act, were to be filed within one year from the date thereof. The claim in dispute was so filed. By section 5, chapter 886 of 1866, claims were to be filed within one year after the injury. *Held*, that even as to claims embraced within the latter statute, its provisions could not be considered as limiting those of the act of 1870; and further, that as this objection was not raised before the appraisers, nor their action reviewed either by appeal to the canal board or by *certiorari*, the matter must be considered as settled.

PEOPLE EX REL. JERMAIN v. THAYER 798

CASE — *When unnecessarily voluminous — Rule 43 — when not complied with.*

See RYAN v. WAYLE 804

CAUSE OF ACTION — *Election — note and debt for which it was taken.*] Where a note is taken, as the result of a statement and compromise, the anterior matters are merged in it, and an action should be brought upon the note, and not upon the prior indebtedness. *LELAND v. MANNING* 7

— *What actions for torts survive — action for fraudulent representations against several defendants — when may be separated and continued, after decease of one defendant.*

See BOND v. SMITH 43

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- *On contract made by infant—when accrues.*
See HALSEY v. REID. 777
- *Manufacture of tent—when cause of action for price accrues.*
See HIGGINS v. MURRAY. 565

CAVEAT EMPTOR — *Warranty—when may exist in case of executory contract.*

- See BROWN v. BURHANS.* 227

CERTIORARI — *When not allowed on application of a few, where many are interested.]* The writ of certiorari should not be granted upon the application of two or three out of a large number of persons, interested in like manner in assessments for local improvements, especially where adequate relief is afforded in proceedings at law. *PEOPLE EX REL. KILMER v. McDONALD*... 187

- *Removing proceedings from Common Pleas to Supreme Court—the statute (2 R. S. [Edm. ed.], 50, § 47) is positive as to right of party to.*
See PEOPLE EX REL. LEWIS v. DALY. 641

CHECK — *When delivery of, is not a payment.*

- See SWEET v. TITUS.* 639

CHILDREN — *Construction of word “children,” used in will.*

- See BOWNE v. UNDERHILL.* 130

CIVIL DAMAGE LAW — 1873, chap. 646—*when action does not lie—meaning of the statute.]* A complaint, alleging that the death of plaintiff's husband was caused by intoxication, caused by liquors sold to him by defendant, and that by his death plaintiff had sustained damages, in being deprived of the companionship of her husband and of the customary support and maintenance of herself and children, does not state a cause of action under chapter 646 of the Laws of 1873.

A right of action exists against the vendor or giver of the liquor only in cases where it lies also against the intoxicated person.

The meaning of the statute is to throw the responsibility for injurious acts of an intoxicated person on the vendor or giver of the intoxicating liquor, but not to make him liable for all results arising from the sale or gift of the liquor. *HAYES v. PHELAN.* 733

CLERKS — 1872, chap. 438, § 1 — *Clerks and assistant clerks of District Courts in New York city—how appointed—tenure of office.*

- See PEOPLE EX REL. HOGAN v. FLYNN.* 647

CODE — § 64, sub. 11 — *Amendment of complaint—the word “may” means “shall.”*

- See WOOD v. SHULTIS.* 309
- § 97 — *When action for specific performance is within.*
See MCCOTTER v. LAWRENCE. 107
- § 110 — *Inapplicable to case of parol ratification of contract of infant.*
See HALSEY v. REID. 777
- § 121 — *Motion to revise action must be made within a year.*
See MATTER OF BAINBRIDGE. 674
- § 121 — *Verdict—when does not prevent abatement of action.*
See COX v. N. Y. CEN. AND HUD. R. R. Co. 171
- § 129 — *Form of summons in action for rent, when rent is payable in wheat.*
See BLAIDSELL v. WHITEFORD. 264
- § 229 — *Attachment—when affidavit sufficiently shows non-residence—need not state it in positive terms.*
See MAYOR v. GENET. 487
- § 236 — *Right of attaching creditor to examination of defendant's debtor.*
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- § 270 — *When court may order reference under—effect of referee's report.*
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- § 294 — *Power of State court to order National Bank to pay over money under.*
See HAVENS v. NAT. CITY BANK. 181
- § 309 — *Extra allowance may be granted under, though action be discontinued before trial.*
See COFFIN v. COKE. 616
- § 311 — *Expense of serving subpoenas cannot be allowed as a disbursement under.*
See TOWN OF PIERREPONT v. LOVELASS. 681
- § 318 — *Costs allowed on appeal from order of surrogate.*
See GILMAN v. REDINGTON. 640
- § 335 — *Liability of estate of deceased surety on undertaking required by.*
See WOOD v. FISK. 525
- § 348 — *Notice of entry of judgment required by—when sufficient.*
See ROGERS v. SCHMERSAHL. 623
- § 372 — *Submission under—both legal and equitable relief may be given.*
See GRAVES v. BRINKERHOFF. 305
- § 399 — *When evidence inadmissible under.*
See SMITH v. HAZARD. 418
- § 399 — *Conversations had with person deceased—when inadmissible.*
See WHEELOCK v. CUYLER. 414
- § 399 — *Evidence taken prior to decease of party in cause which survives.*
See BOND v. SMITH. 48

COLLATERAL SECURITY—Improper disposition of—burden of proof.

- See VOSK v. YULEE.* 628

COLLECTOR OF SCHOOL TAXES—Bond of—no power to collect tax until bond is given—When action lies on bond in favor of trustees.

- See WOODHULL v. BOHENBLOST.* 899

COMMISSIONERS OF CHARITIES AND CORRECTIONS—Power of, to borrow money—1872, chap. 9, § 2.] The commissioners of charities and corrections have no lawful authority to borrow money and thus create a debt against the city of New York. Provisions of chapter 9 of 1872, section 2, construed. *TENTH NAT. BANK v. MAYOR.* 429

COMMISSIONERS OF HIGHWAYS—Order of, as to public highway—when not conclusive as to person claiming highway is a private road—1 R. S., 501, § 1, sub. 3.] When the commissioners of highways of a town meet, and it appearing to them that a certain road has been used as a highway for more than twenty years, order it to be ascertained and recorded, such order is not conclusive upon a person claiming that the said highway is a private road, and that he is the owner of the soil thereof. The statute (1 R. S., 501, § 1, sub. 3) does not authorize the commissioners to create or enlarge, but only to perpetuate the evidence of a public right; the fact of dedication depends on the user. *COLE v. VAN KEUREN.* 263

COMMISSIONS—On sales—agreement for—construction of.] This action was brought to recover commissions claimed to be due under a written agreement by which the defendant promised to pay to the plaintiff ten per cent on all sales made to customers that he solicited, or that might be made through his influence. *Held*, that by a fair interpretation of the agreement, whenever the solicitation was of, or the influence was exercised upon, a person who had already dealt with the defendant, the commission should be confined to the transaction accomplished, thus requiring separate sales by the plaintiff to entitle him to a continuing benefit under the agreement, unless from the length of time during which the customer had ceased to deal with the defendant, it would be a fair inference that he had discontinued his patronage;

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while, if the customer were made such by the intervention of the plaintiff's solicitation or influence, the commissions should be payable on all sales to him as long as the agreement continued unbroken. *RYER v. WIBERLY*..... 632

— *For negotiating sale — when action for, cannot be maintained where plaintiff is employed by both parties to sale.*

See *PLACE v. GREENMAN* 660

COMMON CARRIER — *When contract sufficient to exempt from liability for negligence.*] Where the plaintiff, at the time of shipping certain quince trees, released the defendant from all liability for "damage to perishable property of all kinds, occasioned by delays from any cause, or change of weather * * * or loss or injury by fire or water, heat or cold:" held, that the defendant was not liable for the damage caused by the freezing of the trees, though such freezing occurred through its own negligence.

NICHOLAS v. N. Y. CEN. AND HUD. R. R. Co...... 827

— *When title to property delivered to, passes to consignee.*

See *GILBERT v. N. Y. CEN. AND HUD. R. R. Co.*..... 878

COMPLAINT — *Defective in not stating a cause of action — when cured by answer.*] Where a complaint simply alleges an indebtedness to exist without stating the facts necessary to show such indebtedness, but an answer is put in, stating the matter so omitted in the complaint, and the case has been tried, and, on appeal, a new trial ordered, the court will not, on such new trial, dismiss the complaint on the ground that it does not state a cause of action.

In such case, when the answer alleges that the indebtedness referred to in the complaint accrued for work and labor performed, and proceeds to disclose facts rendering the contract void as against public policy, the complaint and answer sufficiently present the plaintiff's case, and if the contract is not void as against public policy, or for some other valid reason, all that is required to justify a recovery appears by the pleadings. *MILLER v. WHITE* 62

— *Amendment of, in Justice's Court — when it is imperative duty of justice to allow.*

See *WOOD v. SHULTIS*..... 309

— See **PLEADINGS**.

CONSIDERATION — *When illegal consideration does not render negotiable paper invalid in hands of bona fide holder.*

See *GRIMES v. HILLENBRAND* 354

— *Of mortgage — when sufficient.*

See *HADEN v. BUDDENSICK* 649

CONSTABLE — *Execution — when bound to execute it, though void — Proof of execution sufficient in action by, for wrongful taking of goods levied on.*

See *CLEARWATER v. BRILL* 728

— *When protected in execution of process.*

See *FIELD v. PARKER* 342

SMITH v. WARDEN 787

CONSTITUTIONAL LAW — *Chap. 628, 1870, and chap. 298, 1872, providing for laying out Union avenue, etc., in Saratoga Springs, are constitutional and valid.*

See *PEOPLE EX REL. KILMER v. McDONALD*..... 187

— *Chap. 347, 1855, authorizing turnpike company to sell road, is constitutional.*

See *CLOW v. VAN LOAN*..... 184

— *Chap. 335, 1873, abolishing office of assistant alderman in New York city, is constitutional and valid.*

See *DEMAREST v. WICKHAM* 627

— *State Constitution, art. 1, § 14 — when instrument constitutes a sale, and not a lease of lands, and, therefore, not invalid.*

See *RUTHERFORD v. GRAHAM* 796

CONSTRUCTION — *Of word "children," used in will.*

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— <i>Of contract to pay commissions on sales.</i>	
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— <i>Of an arbitrator's award.</i>	
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CONTRACT — *Substantial performance—when sufficient.*] 1. The performance of an agreement must be such as is required by the true spirit and meaning of the contract, and the intention of the parties. A substantial performance is all that is required, unless it be expressly stipulated otherwise, when the party receiving it will derive from it all the benefits that would have resulted from a literal performance, and in practically the same way.

GRAY v. GANNON..... 57

2. — *Receipt of express company—when expresses contract between parties.*] In the absence of fraud or imposition, the receipt delivered by the agent of an express company to the person shipping a package must be held to be the contract between the parties.

It is immaterial whether or not the amount paid by the agent of the shipper was more or less than the usual charge for carriage.

HUNTINGTON v. DINSMORE..... 66

3. — *For sale of land—right to demand affidavit of solvency of vendor's grantor.*] The plaintiff agreed to purchase certain real estate of the defendant, the contract providing that in case the defendant was unable to give a good title at the time therein named, or in case an injunction or attachment should issue to prevent her disposing of the property, the amount paid on the contract should be refunded and the contract rescinded. At the time named, plaintiff refused to fulfill the contract unless defendant would sign an affidavit in regard to the solvency of her grantor; defendant refused to do so, tendered back the amount received, and declared the contract at an end.

In an action for specific performance, *held*, that the plaintiff had no right to require the defendant to sign the affidavit, and that her insisting upon it was equivalent to objecting to the title, and that defendant was thereby authorized to rescind the contract. WORMSER v. GARVEY..... 476

4. — *For sale of land—assignees of—rights and interests as between each other.*] When a contract for the sale and purchase of land is assigned by the purchasing party to two persons, so that each becomes entitled to a one-half interest therein: *held*, that if one of such persons pay to the owner of the land the entire contract-price and take a conveyance thereof to himself, he is bound, on being tendered by his co-assignee one-half of the purchase-money, to convey to him a one-half interest in the land.

PLYMPTON v. BOEHME..... 396

5. — *For sale of land—title of vendee in, superior to that of a grantee with notice.*] When a party, with knowledge of the existence of a contract of sale for certain lands, takes a deed from the owner of the same lands, the equitable title of the vendee in the contract will prevail over that given in the prior conveyance. TOWNSEND v. BISSELL..... 297

6. — *For building school-house—Laches of one contractor by which another is delayed—liability of employer—Certificate by contractor of payment of all demands—when prevents recovery.*] The plaintiff entered into a contract with the school officers of the Eighth ward of the city of New York to do all the carpenter work necessary in erecting a school-house. In consequence of the

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laches of the contractor for the mason work, the plaintiff was delayed in fulfilling his contract, and brought this action to recover the damages sustained thereby.

In compliance with one of the requirements of the contract, the plaintiff, at the time of receiving the final payment, filed a certificate stating "that all claims and demands for extra work or otherwise, under or in connection with the contract * * * have been presented to the said school officers, and the amount to be paid therefor agreed upon by and between them or a majority of them and the undersigned, to wit, the sum of \$433.82; and I further certify that the last payment under said contract * * * will be in full of every claim or demand, except the amount so agreed upon for extra work." *Held*, that the certificate operated as an extinguishment of any claim the plaintiff might have.

Whether, if this were not so, the plaintiff and the mason being fellow-servants, he would not be precluded from recovering, under the rule that one servant cannot maintain an action against the common employer on account of injuries sustained by the negligence of a co-servant, *quære*.

COULTER v. BOARD OF EDUCATION..... 560

7. — *Procured by fraud — remedy of party defrauded.*] The remedy of a party defrauded is either to affirm the contract and sue for the damages occasioned by the fraud, or to disaffirm the contract and to sue for the recovery of whatever has been received under the contract by the other party.

He can pursue the latter remedy only on condition that he has restored, or offered to restore, all that he has himself received under the contract.

VAN LIEW v. JOHNSON..... 415

8. — *For manufacture of tent — when right of action for price accrues.*] When an article is manufactured, and notice of that fact is given to a party who has ordered it, it becomes the property of the party ordering it, subject to the lien of the manufacturer for the price, and a right of action at once accrues for the price. HIGGINS v. MURRAY..... 565

— *Specific performance — delay, when caused by defendant, no defense to action for.*

See DELAVAN v. DUNCAN..... 29

— *Rescission of — to maintain action for, restoration of what has been received must be made.*

See FARRELL v. CORBETT..... 128

— *Rescission of — obligations assumed under, cannot be disaffirmed if fruits of contract have been enjoyed — rule otherwise where nothing has been received.*

See DOWS v. GRISWOLD..... 550

— *Property received under contract void by statute of frauds — when promise to pay for, will be implied.*

See WOOD v. SHULTIS..... 309

— *For sale of logs — when not contract for sale of interest in lands, and therefore not within statute of frauds.*

See BOYCE v. WASHBURN..... 793

— *Agreement to pay debt of another — when within statute of frauds.*

See BELKNAP v. BENDER..... 414

— *For paving in city of New York — failure to publish resolution authorizing — liability of city — when such contract not ratified by payments made under it.*

See MOORE v. MAYOR..... 545

— *Exempting common carrier from liability for negligence — when sufficient.*

See NICHOLAS v. N. Y. CEN. AND HUD. R. R. Co..... 327

— *Reserving growing crops — liability for use of lands — right of ingress and egress.*

See WILSON v. VAN PELT..... 422

— *Specifications annexed to, set out in complaint and answer — when plaintiff cannot recover on allegations of answer but must prove allegations of complaint.*

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- *Agreement between railroad company and contractor limiting liability of company for injuries to employes of contractor—who not bound by.*
See OMINGER v. N. Y. CEN. AND HUD. R. R. Co. 159
- *With another to do illegal act—liability of principal.*
See TOWN OF PIERREPONT v. LOVELASS. 696
- *To pay commission on sales made to customers that plaintiff solicited, or which might be made through his influence—construction of.*
See RYER v. WIBERLY 632
- *Of infant—parol ratification of—§ 110 of Code inapplicable to—when cause of action on, arises—statute of limitations.*
See HALSEY v. REID 777
- *When draft of, inadmissible as evidence of agreement of parties.*
See FLOOD v. MITCHELL 813
- *Right of corporation to maintain action for construction of.*
See OGDENSBURG, ETC., R. R. Co. v. VT. AND CANADA R. R. Co. . 712

CONTRACTOR—Unlawful act of—when principal liable for.

- See* TOWN OF PIERREPONT v. LOVELASS 696

CONTRIBUTORY NEGLIGENCE:

- See* NEGLIGENCE.

CORPORATION—Acquisition of property before incorporation completed—subscriptions may be in chattels.] 1. Corporations may acquire title to money paid upon subscriptions to capital stock before the corporation has a legal existence, and such subscriptions may be in the form of property other than money. *AMERICAN SILK WORKS v. SALOMON* 135

2. — *Amendment to articles of association—when not retroactive.]* The defendant's articles of association provided that upon the death of one of its members, his widow should be entitled to receive four dollars monthly during widowhood. After the death of plaintiff's husband the article was amended so as to entitle the widows to receive one dollar from each member of the society. *Held*, that the new article was not retroactive, and that plaintiff was entitled to receive the monthly allowance provided for by the original article. *GUNDLACH v. GERMANIA MECHANICS' ASSOCIATION* 339

3. — *Failure of trustee to file annual report—when action cannot be maintained for.]* An action cannot be maintained against a trustee of a mining company for a failure to file the report required by section 12 of the act of 1848, by the assignee of a demand, which, at the time of the failure to file the report, belonged to the president of the company who was one of the trustees. *BRONSON v. DIMOCK* 614

4. — *When incorporator liable for subscription for stock—when estopped from denying legal incorporation of company.]* The defendant with others signed an agreement to unite in the formation of a company, and to take a number of shares of stock therein specified; subsequently he, with others, signed a certificate of incorporation as required by the act of 1848. In an action brought by the receiver of the company to recover the amount due upon the shares subscribed for by the defendant, *held* (1), that the defendant was estopped from denying that the company was legally incorporated; (2), that he was liable for the number of shares subscribed for by him.
DORRIS v. FRENCH 292

5. — *Action to recover subscription—when fraud of directors not a defense.]* The fact that the promoters of a corporation have purchased for it a patent right of which they were the owners, at an exorbitant price, furnishes no defense to a stockholder in an action brought by the corporation to recover the amount due upon the stock held by him. *Id.*

6. — *Benevolent society—powers of.]* A corporation whose general purpose is declared to be the welfare of its members, and particularly their relief in times of sickness and distress, may extend its benefits to the families of its members, and make provision for the widows of deceased members.
GUNDLACH v. GERMANIA MECHANICS' ASSOCIATION 339

CORPORATION — Continued.

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7. — *When enjoined from transferring its property at suit of stockholder.*] The plaintiff owned, and held as security, a large quantity of the stock of the Mariposa Land and Mining Company, a corporation organized under the laws of this State, to which a large tract of land had been conveyed, constituting the bulk of its property. A new company was afterward organized in California, to which it was proposed to convey all the property of the former corporation. The plaintiff, claiming that such transfer was made with the intent to render his stock worthless, and to deprive him of "all control of the company brought this action to restrain the defendant from carrying such transfer into effect, and to secure the appointment of a receiver. *Held*, that the granting of a temporary injunction and the appointment of a receiver were proper. *KELLY v. MARIPOSA LAND AND MINING Co.* 632

8. — *Right of, to maintain action for construction of agreement.*] Where a railroad corporation, organized under the laws of this State, has leased its road to a foreign corporation for a term of years, and subsequently an action is commenced against it by the attorney-general to have its charter forfeited on the ground that the agreement was illegal, such corporation cannot bring an action against the corporation with which it has contracted, to have this court decide whether or not such contract was *ultra vires*, and, if it be so, to adjudge it entitled to recover possession of its property.

OGDENSBURGHE, ETC., R. R. Co. v. VT. AND CANADA R. R. Co. 712

— *Trustees of — alleged payment of dividend by, in violation of Revised Statutes — Revised Statutes and act of 1848 are repugnant to each other, and both do not apply to same corporation.*

See EXCELSIOR PETROLEUM Co. v. EMBURY 648

— *Distribution of assets of — When receiver, without notice of claim before paying dividend, not required to pay creditor.*

See SMITH v. MANHATTAN INS. Co. 127

— *See FOREIGN CORPORATION.*

MUNICIPAL CORPORATION.

COSTS — Order directing payment of, to attorney — when proper.] 1. The plaintiff, in an action for breach of promise of marriage, being desirous of changing her attorney, an order was entered directing such change to be made, and providing that \$200 costs of the former attorney be made a prior lien on any judgment recovered, and that the same should be paid out of the first money received thereunder. Subsequently the suit was settled, and \$2,900 paid to the attorney. Upon the application of the first attorney an order was made directing the plaintiff and the second attorney, to pay over \$200 to him. *Held*, that the order was proper, and should be affirmed.

HAMMOND v. DEAN 131

2. — *Retaxation of — motion for, denied on ground of laches.*] The plaintiff's bill of costs was adjusted by the clerk on default, after due notice, in January, 1872. In November, 1872, the appellants noticed a motion for readjustment, which was heard at Special Term on the 12th of December, 1872, and denied. *Held*, that the delay in making the motion, for which no excuse was shown, was so great, that the motion was properly denied on the ground of laches.

PENFIELD v. JAMES 69

3. — *Order opening inquest and directing costs to abide event — effect of such order when less than fifty dollars is recovered.*] When an order opening an inquest directs that the costs of the inquest, and ten dollars costs of the motion for such order, abide the event, and upon the final trial, the claim being one which might have been sued upon in the Justice's Court, the plaintiff recovers less than fifty dollars, he is not entitled to such costs. *NEW v. ANTHONY*.... 52

4. — *On appeal from order of surrogate — Code, § 318.*] Upon appeal to the General Term from an order of the surrogate, the costs which may be allowed under section 318 of the Code, are only those which may be recovered in an action at issue on a question of law from the time the proceeding is brought into the Supreme Court, viz., twenty dollars for the argument and ten dollars for each term the appeal is necessarily on the calendar, and the disbursements.

GILMAN v. REDINGTON 640

COSTS—Continued.

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5. — *Code, § 311 — Expense of serving subpoenas.*] The expenses incurred by a party in serving subpoenas upon witnesses, cannot be allowed by the clerk as a necessary disbursement, under section 311 of the Code.

TOWN OF PIERREPONT v. LOVELASS..... 681

— *In proceedings of railroad company to acquire lands—chap. 270, 1854, authorities.*

See MATTER OF SYRACUSE, B. AND N. Y. R. R. Co. 311

— *Extra allowance may be granted under § 309 of Code, though action be discontinued before trial.*

See COFFIN v. COKE..... 616

— *Extra allowance — when not granted — laches.*

See BOARD OF COMMISSIONERS OF PILOTS v. SPOFFORD..... 74

— *When receiver charged personally with costs in action upon bond of indemnity.*

See CHAPIN v. THOMPSON 779

COUNTER-CLAIM — *Action for rent — when damages for breach of contract by landlord may be set up as a counter-claim.*] In an action brought to recover rent, a mere trespass, or a tort of any character not amounting to eviction in whole or in part, cannot be set up as a defense.

Where a landlord, being desirous of repairing the roof of his building, agreed with the tenant that if he would allow him to enter upon the premises and repair the same, he would do the work with diligence, care and caution, which he failed to do, whereby the tenant was injured: *held*, that the tenant might set up the damages sustained thereby as a counter-claim in an action brought by the landlord to recover rent. WALKER v. SHOEMAKER..... 579

— *When inadmissible in action for fraud.*

See MILLER v. BARBER..... 802

COUNTY COURT — *Appeal from judgment of — how may be taken.*] Where an action is commenced in a County Court, an appeal may be taken from a judgment entered therein, upon a case and exceptions, without first moving in such court for a new trial. BEATTY v. MYERS..... 286

COUPONS — *Bona fide purchaser of stolen coupons — rights of.*] Coupons separated from their bonds are, in law, regarded as bank bills, and a bona fide purchaser, in the usual course of business, for full value, without notice, will be protected, although the coupons were overdue when sold, and were stolen by the party disposing of them to the purchaser.

EVERTSEN v. NAT. BANK OF NEWPORT..... 692

CREDIT — *Sale — credit given to agent instead of principal — whether principal discharged by, question for jury.*

See MARYLAND COAL CO. v. EDWARDS..... 433

— *Where sale on credit is induced by fraud, action lies at once for purchase-price.*

See REID v. MARTIN..... 590

CRIMINAL LAW — *Murder — when killing is murder in first degree, and not manslaughter — chap. 197, 1862.*] 1. The court was requested to charge, in effect, that if the prisoner detected the deceased committing adultery, and thereupon instantly struck her, and from the effects of such blow she died, the killing was manslaughter, although the blow was given with intent to kill. *Held*, that the charge was properly refused; that such killing would be murder in the first degree. SHUFFLIN v. PEOPLE..... 16

2. — *Forgery of instrument invalid on its face.*] The prisoner caused to be engraved and printed what purported to be warrants drawn by the auditor of public accounts on the State treasurer of Mississippi, and had a seal made. He filled in the blanks of two warrants, but made no impression with the seal upon them. He then sent all the warrants and the seal to Mississippi. The warrants, by the law of Mississippi, were invalid without a seal. *Held*, that the instruments, being invalid on their face, were not the subject of forgery. CUNNINGHAM v. PEOPLE 455

CRIMINAL LAW — *Continued.*

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8. — *Forgery of instrument prescribed by statute but unknown to common law.*] If a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making an instrument in a form not provided by statute, even though it is so like the genuine as to be liable to deceive most persons. *Id.*

4. — *Larceny — obtaining property by artifice — when constitutes larceny — when title does not pass.*] The prisoner received a lot of jewelry from Kuhn & Co., with the understanding that if not sold the jewelry was to be returned, and that if any part was sold he was to return the price of the part so sold. *Held*, that, under such arrangement, the title to all the articles not sold remained in Kuhn & Co.

Held, that if the possession of the jewelry was obtained feloniously, for the purpose of depriving the owners of it, by means of such artifice, it constituted the crime of larceny. *WEYMAN v. PEOPLE* 511

5. — *Intent — when may be shown by similar transactions.*] For the purpose of showing the guilty intention in such case, it is competent to show that the party accused was engaged in other similar frauds about the same time, when the transactions are so connected as to time, and so similar in their other relations, that the same motive may reasonably be imputed to them all. *Id.*

6. — *Obtaining money by false pretenses distinguished.*] The distinction between this class of cases and obtaining money by false pretenses, is, that in the latter the owner intends to part with his title. *Id.*

7. — *Mayhem — disabling must be done "on purpose."*] In order to bring an act within the fourth class mentioned in the statute relative to mayhem, *i. e.*, to "cut off or disable any limb or member," the cutting or disabling must be done on purpose, and not be the result merely of an unexpected, instantaneous encounter, or of the heat of sudden passion, or of the excitement produced by the fear of bodily harm. *BURKE v. PEOPLE* 481

8. — *Mayhem — statements of complainant — when inadmissible.*] In a prosecution for mayhem, it is error to allow the statement, made by the complainant to a third party, in the absence of the prisoner, that he was afraid the prisoner would return and assault him, to be given in evidence, when there is nothing in the case going to justify such apprehension. *Id.*

9. — *Perjury in making affidavit annexed to claim against municipal corporation — indictment for — what must be alleged in.*] A prisoner was convicted of the offense of willfully and corruptly swearing false in an affidavit made for the purpose of obtaining audit of an unliquidated claim against the city of Buffalo, pursuant to the statute, which statute makes false swearing in an affidavit authorized by the act perjury. It was not averred in the indictment that the affidavit was authorized by the charter, or that it was made for the purpose required thereby, or that the claim to which it was appended was ever presented to the common council for audit. *Held*, that the indictment was fatally defective. *ORTNER v. PEOPLE* 323

10. — *Selling liquor without license — indictment for, need not state name of street or number of house.*] In an indictment for selling liquor without a license, it is sufficient to allege that the liquor was sold in the Ninth ward of the city of New York, to be drank in the house, store, shop and place of the seller, without stating the name of the street or the number of the house.

SCHWAB v. PEOPLE 520

11. — *Selling liquor without license.*] It is not necessary, to constitute an offense under the statute, that the wine should be intoxicating. *Id.*

12. — *Conviction at Special Sessions after indictment at General Sessions.*] Complaint was made before a police justice charging the relator with the commission of a misdemeanor under the acts for the prevention of cruelty to animals. The relator demanded a trial by jury. The case was sent to the General Sessions, where the relator was indicted and arraigned and pleaded not guilty. Afterward, with the assent of the district attorney, the relator applied to have the complaint sent back to the Special Sessions, which was done and an indorsement to that effect made on the indictment. The relator was brought before the Court of Special Sessions, pleaded not guilty, was

CRIMINAL LAW — Continued.

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tried and convicted, and moved, in arrest of judgment, that if his trial was on the indictment the court had not jurisdiction; if on the complaint, that that had been superseded by the indictment. *Held*, that the relator was to be deemed to have been tried on the complaint, and that the proceedings and assent of the parties should be considered as an abandonment of the indictment. **PEOPLE EX REL. WALKER v. SPECIAL SESSIONS** 441

13. — *Cruelty to animals — Dog — what is lawful use of.*] A dog, although not a beast of burden, may lawfully be used upon a treadmill or in any other serviceable employment; but if he is cruelly used, it becomes a crime. *Id.*

14. — *Indecent exposure — what is "public place."*] Where six women made an indecent exposure of their persons for hire, in the presence of five men, in a room in the rear of the second story of a house of prostitution, the doors, windows and shutters being closed, *held*, that the room where it occurred was a "public place," and that the women were properly convicted of the crime of indecent exposure. **PEOPLE EX REL. LEE v. BIXBY**, 636

15. — *Joint conviction — when may be had.*] The offense being a misdemeanor committed by all the relators at the same time, each aiding and abetting every other, *held*, that they might be jointly prosecuted and convicted. *Id.*

— *Grand Larceny — possession of property obtained by causing owners to send it to fictitious persons — hearsay evidence as to existence of persons claimed to be fictitious, inadmissible.*

See **WIGGINS v. PEOPLE**..... 540

— *Perjury, assigned upon verification of answer containing allegation that defendant "says he denies," etc.*

See **PEOPLE v. CHRISTOPHER**..... 805

— *Perjury committed on examination before fire marshal — Indictment — variance.*

See **HARRIS v. PEOPLE**..... 1

— *Evidence — what circumstantial evidence sufficient to authorize conviction in criminal cases.*

See **MURPHY v. PEOPLE**..... 102

CROPS — *Contract reserving — liability for use of lands — right of ingress and egress.*

See **WILSON v. VAN PELT**..... 422

CRUELTY TO ANIMALS — *Dog — what is lawful use of — Indictment for — when deemed abandoned by removal of curse from General Sessions to Special Sessions.*

See **PEOPLE EX REL. WALKER v. SPECIAL SESSIONS**..... 441

CUSTOM — *As to authority of agent — when party presumed to have dealt with reference to.*

See **WHITE v. FULLER**..... 681

DAMAGES — *Exemplary damages — when not allowed.*] 1. The essence of a wrong's justifying exemplary damages is, that it shall be an intentional violation of another's rights, or that a proper act shall be done with an excess of force and violence, or with malicious intent to injure another in his person or property. **COX v. N. Y. CEN. AND HUD. R. R. Co.**..... 171

2. — *When excessive — when verdict set aside.*] In actions other than those on contracts, sounding in damages, it is strictly within the province of the jury to estimate the loss suffered, and courts will not interfere unless there is manifest abuse, or the sum is so large as to show that the jury were affected by passion, prejudice or some undue influence.

PECK v. N. Y. CEN. AND HUD. R. R. Co...... 236

8. — *Inadequate damages — remedy by motion for new trial.*] A party cannot, on appeal from a judgment entered on a verdict in his own favor, claim that the damages found were too small. His remedy is by a motion for a new trial on a case.

DAMAGES—*Continued.*

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The proceeding to obtain a new trial for inadequate damages, is, by analogy, the same as that for excessive damages. *CARPENTER v. BEARE*... 509

— *Market-price—how proved.*

See *HARRISON v. GLOVER*..... 121

— *In allowing cow to become dry—how proved.*

See *SMITH v. WILCOX* 411

— *Measure of, in action for cutting and removing standing timber.*

See *STANTON v. PRITCHARD* 266

— *Measure of, in action against broker for neglect to tender gold sold for principal.*

See *SPEYER v. COLGATE*..... 622

— *Special damages proved on trial, though not alleged in complaint—when judgment not reversed for such error.*

See *CLEMONS v. DAVIS* 260

DATE—*Of written instrument only presumptive evidence of time of its execution—mistake in, may be shown by parol evidence.*

See *GERMANIA BANK v. DISTLER* 633

DEBTOR AND CREDITOR—*Insolvent corporation—distribution of assets of—when creditor may be allowed to present claim.*] 1. Where, at the time of the appointment of a receiver of an insolvent corporation, a suit is pending against it, the plaintiff therein may, at any time before the entry of a final decree excluding all creditors who have not presented their claims, be permitted to come in, prove his claim, and participate equitably in the distribution of the fund still in the hands of the receiver.

SMITH v. MANHATTAN INS. CO 127

2. — *When receiver, having no notice of claim, not required to pay dividend on it.*] But where in such case the receiver had no actual notice of the petitioner's claim before making the second dividend, and has reserved no fund applicable specifically to the payment thereof, it is error to require him to pay to the petitioner his proportion of such dividend. *Id.*

3. — *When creditor estopped, by his acquiescence therein, from asserting that a transaction of his debtor was fraudulent.*] Where money is lent to one, who, with the knowledge and assent of the creditor, uses the same in erecting buildings upon land belonging to his wife, the creditor cannot afterward maintain an action to charge the debt upon the land of the wife, on the ground that such disposition of the money was, as to him, fraudulent. *SCHOLEY v. WORCESTER*..... 302

— *Agreement to pay individual debts of partner with partnership assets—when fraudulent as against creditors.*

See *LESLIE v. RUGG* 410

— *Remedy of creditor where receiver pays fictitious and unfounded claims, and payments are confirmed by order of court.*

See *SCHENCK v. INGRAHAM*..... 67

— *Code, § 236—right of attaching creditor to examination of a debtor of defendant.*

See *BAXTER v. MISSOURI, KANSAS AND TEXAS R. CO.*..... 630

DECREE—*When parties to, bound by.*

See *HAWKS v. SWETT*..... 146

MARSTON v. SWETT..... 153

DEDICATION—*Of lands for street—what constitutes—rights of city in lands dedicated.*

See *MATTER OF INGRAHAM*..... 495

DEED—*When acceptance of, not presumed.*] An acceptance of a deed will not be presumed from its being made and recorded by others, without the sanction of the grantee. *DAY v. MOONEY* 134

— *Habendum clause “to the uses and purposes” of a railroad—effect of.*

See *LUDLOW v. HUDSON RIVER R. R. CO.*..... 239

DEFENSE — <i>Fraud in obtaining release — must be pleaded in action to recover the debt — Action to set aside release cannot thereafter be maintained.</i>	
<i>See</i> DAMBMAN v. SCHULTING	50
— <i>Statute of limitations — when defense of, must be interposed by obligee in bond of indemnity against claims, suits, etc.</i>	
<i>See</i> CHAPIN v. THOMPSON	779
DESCENT — <i>Posthumous children — design of statute in reference to.</i> The design of the statute, in reference to posthumous children, was to give them the same portion precisely as they would have if the parent had died intestate, and where the children are the devisees, the object of the statute can only be accomplished by requiring each to contribute, in proportion to his devise, to make up such share of the property as would have gone to the after-born in case of intestacy, and subjecting each devisee to the same burdens as the after-born in proportion to the estate held: <i>i. e.</i> , to contribute proportionally toward the payment of any claim against the deceased, to enforce which proceedings are taken against the devisees and heir in default of personal property. <i>ROCKWELL v. GEERY</i>	606
DEVISE — <i>Charge upon — when a lien, though devise has lapsed.</i>	
<i>See</i> THURBER v. CHAMBERS	721
DEVISEES AND LEGATEES — <i>Assessment among, of share of post-testamentary child — legacy in lieu of dower.</i>	
<i>See</i> SANFORD v. SANFORD	758
— <i>When cannot maintain action for construction of will.</i>	
<i>See</i> CHIPMAN v. MONTGOMERY	789
DISCONTINUANCE — <i>When proceedings of railroad company to acquire lands may be discontinued — costs.</i>	
<i>See</i> MATTER OF SYRACUSE, B. AND N. Y. R. R. Co.	311
DISCOVERY — <i>When inspection of books not allowed.</i> In an action brought to recover for services rendered as book-keeper, an inspection of the books of the defendant should not be ordered to enable the plaintiff to have them examined by an expert, so that he may testify from their appearance as to the value of the services rendered in keeping them. The proper way is to prove the services and the time occupied in performing them, and then prove their value. <i>MINER v. GARDINER</i>	132
DISTRICT COURTS — 1872, chap. 438, § 1 — <i>clerks and assistant clerks — how appointed — tenure of office.</i>	
<i>See</i> PEOPLE EX REL. HOGAN v. FLYNN	647
DOG — <i>What is lawful use of.</i>	
<i>See</i> PEOPLE EX REL. WALKER v. SPECIAL SESSIONS	441
DOMICILE — <i>Distinction between domicile and residence.</i>	
<i>See</i> MAYOR v. GENET	487
DOWER — <i>When instrument constitutes a sale, and not a lease, of interest of doweress.</i> 1. A widow, being in possession of certain lands which had been admeasured to her for her dower, executed an instrument under seal, whereby she "leased and to farm let," the same to the defendant, from April 1, 1868, to April 1, 1874, for which he agreed to pay her \$500 at the date of the said agreement, and in case she was living at the expiration of that time, the lease was extended for the term of her natural life, for which defendant agreed to pay her \$400 within ten days after April 1, 1874, with interest from April 1, 1868, until it should be paid. <i>Held</i> , that this was a sale of the estate of the doweress, and not a lease thereof, and that it was not in violation of the fourteenth section of the first article of the Constitution.	
<i>RUTHERFORD v. GRAHAM</i>	796
2. — The right to dower comes by law, and the heir may assign the same to the widow voluntarily. The admeasurement fixes only the location and extent. <i>Id.</i>	

DOWER — *Continued.*

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— *Legacy in lieu of* — *abates like other legacies* — *is not charge upon real estate* — *preference of, over other legacies.*

See *SANFORD v. SANFORD*..... 753

DUTIES — *Jurisdiction of State court of action by United States for recovery of* — *Principle of implied contracts is applicable to payment of.*

See *UNITED STATES v. GRAFF*..... 634

EASEMENT — *Right of way* — *Adverse use* — *when presumed.*] When the owners of adjoining lots make a way between them, each setting off an equal portion of land for that purpose, and they and their grantees continue to use it in common as a way for a period of twenty years, the inference is that such use was under a claim of right and adverse. *TOWNSEND v. BISSELL*... 297

— *When may be sold under execution.*

See *EVANGELICAL, ETC., ORPHANS' HOME v. BUFF. HYDR. ASSO.*... 419

— *Lateral support of land* — *when owner estopped from asserting right to.*

See *LUDLOW v. HUDSON RIVER R. R. Co.*..... 239

EJECTMENT — *Judgment in* — *who not bound by* — *notice lis pendens* — *who affected by.*] The plaintiff herein recovered a judgment against one Nancy Bull, in an action of ejectment brought against her, and by virtue thereof was put into possession of the premises. Subsequently this action was brought to recover the rents and profits of the land which had been occupied by the defendant during the pendency of the ejectment suit, under a lease from a person not claiming under Nancy Bull. *Held* (1), that the former judgment was not evidence of plaintiff's title as against the defendant; (2), that the defendant was not bound by the filing of a notice of *lis pendens* in the ejectment suit, as he did not acquire his title from the defendant therein.

THOMPSON v. CLARK..... 164

— *Judgment* — *conclusive as to matters adjudicated* — *when not invalidated by neglect to enforce right by writ of possession.*

See *CAGGER v. LANSING*..... 812

ELECTION — *Of remedies.*] An election of one of two inconsistent remedies, whenever made, is conclusive against the right of the party to adopt the other. *WRIGHT v. PIERCE*..... 351

— *Of remedies* — *when party bound by* — *Estoppel.*

See *KING v. GALVIN*..... 258

ESTOPPEL — *Election of remedies* — *when party bound by.*] 1. This action was brought to recover the value of certain property belonging to the plaintiff, taken by the defendant, a judgment creditor of one Phillips, on an execution issued against him, as being his property; after the commencement of this action Phillips was declared a bankrupt, and his assignee sued the plaintiffs for property of Phillips fraudulently purchased of him by them, and recovered judgment against them therefor. In this proceeding plaintiff claimed and was allowed to deduct from such claim against them, whatever the sheriff, by virtue of the execution against Phillips, had taken from them, such deduction including the property sought to be recovered in this action. *Held*, that the plaintiff having been allowed the value of the property taken by the defendant, in the suit brought by the assignee of Phillips, could not now deny that such property belonged to him; and that this action could not be maintained.

KING v. GALVIN..... 258

2. — *Letter* — *when party estopped by.*] The defendants having been directed to purchase, with money of the plaintiff then in their hands, \$4,000 of United States bonds, wrote to the plaintiff's agents advising them of the purchase and the cost attending it. *Held*, that this letter operated as an estoppel upon the defendants, and prevented them from thereafter denying that they had purchased the bonds as therein stated.

LAMBERTSON v. VAN BOSKERCK..... 628

— *Letters patent* — *when assignor of, not estopped from setting up their invalidity.*

See *HAWKS v. SWETT*..... 146

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- *Lateral support of land — when owner estopped from asserting right to, by his deed with habendum clause "to uses and purposes" of a railroad.*
See LUDLOW v. HUDSON RIVER R. R. CO. 239
- *When incorporator estopped from denying legality of incorporation of company.*
See DORRIS v. FRENCH. 292
- *When creditor estopped, by his acquiescence therein, from asserting that a transaction of his debtor was fraudulent.*
See SCHOLEY v. WORCESTER 302

EVIDENCE — *When to be passed upon by court, and when by jury.* 1. Whether there is any evidence in the case is a question for the court; whether there is sufficient evidence to justify a verdict is a question for the jury.

BOOS v. WORLD MUT. LIFE INS. CO. 188

2. — *Witness — how may be impeached.* The plaintiff in error was tried and convicted for the murder of his wife, by means of an assault upon her person. The mother of the plaintiff in error was called as a witness, and testified that the assault was by no means a serious one. Upon her cross-examination she denied that she had told one Mary McGinn, on the morning after the murder, that she was in great trouble; that her son had been raising a great disturbance. Mary McGinn was called to contradict her, and asked whether she saw old Mrs. Shufflin that morning, to which question the prisoner objected as incompetent and leading. *Held* (1), that the evidence was admissible to impeach the testimony of Mrs. Shufflin; (2), that the question was proper in form. SHUFFLIN v. PEOPLE 16

3. — *Leading question — allowance of, in discretion of court — ground of objection must be stated.* The indictment charged that the death was occasioned by an assault, but did not aver that it was in any way produced by means of a knife. Upon the trial, a policeman testified that a knife, covered with blood, was found on the premises, and was then asked whether a knife, produced in court, was the one so found. The question was objected to as leading. *Held* (1), that the court could allow leading questions in its discretion; (2), that as the objection was put upon that ground, it could not now be insisted that the evidence was not admissible under the indictment. *Id.*

4. — *General demeanor of deceased when intoxicated — evidence as to, inadmissible.* A question, on the part of the defense, as to what the general demeanor of the deceased was when intoxicated, was excluded. *Held*, that this was proper; what her demeanor was on any other occasion than that of the homicide, or immediately preceding it, was immaterial. *Id.*

5. — *Exception must be taken — without it court has no power to set aside verdict as against evidence.* This court has no authority over questions arising on the trial of an indictment, except such as is given by statute; in order to present the point, relied upon as error, an exception must be taken; without it the court has no power to set aside a verdict because it is unsupported by the evidence. *Id.*

6. — *What circumstantial evidence sufficient to authorize conviction in criminal cases.* To authorize a conviction in criminal cases, upon circumstantial evidence, it is not necessary for the prosecution to prove the case, to the exclusion of every possibility that the crime was committed by a person other than the prisoner; it is sufficient if the evidence satisfy the understanding and conscience of the jury, and exclude from their minds all reasonable doubt of the guilt of the accused. MURPHY v. PEOPLE 102

7. — *Pleadings in suits — parol evidence as to contents of — general objection insufficient.* Upon the trial of the plaintiff in error for murder, a witness was allowed to testify that he was defendant in several suits in which the plaintiff in error and others were plaintiffs, and that he, together with the deceased, had been several times to attend the trial of them. He was then allowed to testify, against the objection of the plaintiff in error, as to what the suits were brought for. The prosecution offered the evidence to show that the motive of the prisoner in committing the murder was to prevent the deceased from testifying against him. *Held*, that as the objection was

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general it could not now be insisted that the contents of the pleadings in such suits could not be proved by parol. *Id.*

8. — Exceptions to the rule as to the admission of parol evidence of the contents of written instruments stated. *Id.*

9. — *Note given in settlement of suits—pleadings in such suits admissible to prove consideration.*] In an action brought upon a note given in settlement of claims due to the plaintiff's testator, the pleadings in the suits between the parties, which culminated in the making of the note, are competent evidence to show that the note was given for a valuable consideration, and for the benefit of the estate. *LELAND v. MANNING*..... 7

10. — *Property damaged by trespass—what evidence admissible to prove value of.*] Upon the trial of an action brought by the plaintiff to recover the damages occasioned by cattle of the defendant entering on his land, and destroying his grass and apples, a witness was asked: "To the best of your knowledge, were there 100 bushels of apples there?" *Held*, that the question was proper and that it was not objectionable as calling for the opinion of the witness. *TOWNSEND v. BRUNDAGE*..... 264

11. — *Ambiguity as to order for shipment—explained by course adopted under prior shipment under the same contract.*] For the purpose of explaining an ambiguity in an order relating to the shipment of an engine, evidence may be given of the course adopted and approved of in the prior shipment of another engine under the same contract. *GRAY v. GANNON*..... 57

12. — *Statements of third persons to witness as to existence of certain persons claimed to be fictitious.*] On the trial of an indictment for grand larceny, alleged to have been committed by means of a trick, by which the owners of the stolen property were induced to send it to fictitious persons, in consequence of which the prisoner feloniously acquired possession of it, the statements of persons of whom a witness for the prosecution inquired as to the existence of the persons to whom such property was directed to be sent, are hearsay, and not proper evidence against the prisoner.

WIGGINS v. PEOPLE..... 540

13. — *Value—loss in value of cow by allowing her to become dry—how proved.*] This action was in trover, the defendant being charged with wrongfully taking and detaining the plaintiff's cow. The plaintiff claimed that the cow was dried up through the fault of the defendant while in his possession. Upon the trial a farmer, acquainted with the cow, was asked: "How much less is she worth, being dried up, than she would be if giving milk?" *Held*, that the question was proper. *SMITH v. WILCOX*..... 411

14. — *Code, § 399—conversations had with persons deceased.*] Where in an action of trespass, *quare clausum fregit*, defendant claims to have entered as the agent of the owners, the testimony of plaintiff's grantors as to conversations between them and a person deceased at the time of the trial, through whom defendant's principal claims, is inadmissible under section 399 of the Code. *WHEELLOCK v. CUYLER*..... 414

15. — *Removal of passenger from railroad car—evidence of attempt to avoid payment of fare on other occasions—Right to resist conductor.*] In an action brought for the recovery of damages, alleged to have been sustained by the plaintiff by being improperly removed from defendant's cars after having paid his fare, evidence going to show that on other occasions plaintiff had done acts showing an attempt to avoid payment of his fare, is properly rejected.

A charge that plaintiff had a right to resist the conductor's attempt to put him off the car, if he was rightfully there, *held*, proper.

ENGLISH v. DEL. AND HUD. CANAL CO...... 683

16. — *Admissions—when admissible—Statements—when admissible in party's favor.*] In order to give in evidence against a party his admissions, it is necessary to examine the party first as to whether or not he has made such admissions. Whatever was said by the same person, in the same conversation, that would in any way qualify or explain the statement proved to have been made by him, is admissible in his favor. And although the party alleged to have made the admissions is asked by the adverse counsel, before proof is given of such statement by him, whether he so stated or not, he is not thereby

EVIDENCE — *Continued.*

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precluded from giving evidence, after the proof of such admissions on his part has been made, of other statements made by him in the same conversation. <i>ROOT v. BROWN</i>	797
— <i>Services in keeping books — how value of, proved.</i> See <i>MINER v. GARDINER</i>	182
— <i>When inadmissible under § 399 of Code.</i> See <i>SMITH v. HAZARD</i>	418
— <i>Mayhem — statements of complainant as to fears of an assault by prisoner — when inadmissible.</i> See <i>BURKE v. PEOPLE</i>	481
— <i>Will — latent ambiguity — parol evidence admissible to explain.</i> See <i>TRUSTEES v. COLGROVE</i>	862
— <i>Admitted without objection — when not struck out.</i> See <i>WHEELER v. SEE</i>	662
— <i>Taken prior to decease of party, when action survives.</i> See <i>BOND v. SMITH</i>	48
— <i>Draft of contract — when inadmissible as evidence of agreement of parties.</i> See <i>FLOOD v. MITCHELL</i>	813
— <i>When allegations of answer are insufficient as evidence for plaintiff.</i> See <i>MANSFIELD v. KERNER</i>	183
— <i>Statements of station-agent's wife as to stopping of train inadmissible.</i> See <i>TABER v. DEL., LACK. AND WEST. R. R. Co.</i>	765
— <i>Acts and sayings of either of two parties jointly guilty of fraud, admissible.</i> See <i>MILLER v. BARBER</i>	802
— <i>Insurance — policy admissible though unaccompanied by application — conversations between witness and administrator — when inadmissible.</i> See <i>CUSHMAN v. U. S. LIFE INS. Co.</i>	788
— <i>Date of promissory note — only presumptive evidence of time of execution — mistake in, may be shown by parol evidence; by indorsee as well as by payee.</i> See <i>GERMANIA BANK v. DISTLER</i>	633
— <i>Alteration of note.</i> See <i>NAT. STATE BANK v. RISING</i>	798
— <i>Letters of administration — production of, in evidence sufficiently establishes representative character of administrator — Code, § 399 — Conversations — when inadmissible under.</i> See <i>PARHAN v. MORAN</i>	717
— <i>Proof of judgment not required in action by constable for conversion of goods levied on — proof of execution sufficient.</i> See <i>CLEARWATER v. BRILL</i>	728

EXAMINATION — *Of debtor, under Code, § 236 — right of attaching creditor to.*

See <i>BAXTER v. MISSOURI, KANSAS AND TEXAS R. Co.</i>	630
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EXCEPTIONS — *Reference — no exception lies to refusal of referee to find the particulars which go to make up his general conclusions of fact.*

See <i>AVERY v. FOLEY</i>	415
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EXCISE — *New York city — § 15, chap. 628, 1857, applicable to.] Although section 15 of chapter 628 of the Laws of 1857, was, by chapter 378 of 1866, rendered inapplicable to the city of New York, yet the latter statute was repealed by chapter 175 of 1870, and the former statute restored.*

<i>SCHWAB v. PEOPLE</i>	520
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EXECUTION — *When officer bound to execute it, though void.] 1. A constable, having an execution valid on its face, and issuing from a competent authority, is bound to execute it, even if he have knowledge of facts rendering the execution void. CLEARWATER v. BRILL.*

2. — <i>Proof of, sufficient in action for wrongful taking of goods levied on.]</i>	728
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EXECUTION — *Continued.*

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A constable, being in actual possession of goods by virtue of executions valid on their face, is not bound, in order to maintain an action against a stranger for taking the goods, to prove the judgment. Proof of the execution is sufficient. *Id.*

— *Issued by justice of the peace — need not show on its face that justice had jurisdiction of action — When officer protected by.*

See FIELD v. PARKER..... 343

— *When easement may be sold under.*

See EVANGELICAL, ETC., ORPHANS' HOME v. BUFF. HYDR. ASSO..... 419

EXECUTORS AND ADMINISTRATORS — *When indorsement of note to, need not be alleged.* 1. In an action brought by two executors upon a promissory note, given to one in settlement of a debt due from the maker to the estate of the decedent, it is not necessary to allege that the note was indorsed to them. *LELAND v. MANNING*..... 7

2. — *When probate in foreign country or this State need not be alleged.* Where letters of administration are granted by the surrogate to foreign executors, it is not necessary, in an action brought by them, to allege the probate of the will in the foreign country, or in this State. *Id.*

3. — *Duty of, as to compounding debt.* An executor is bound to compound and release a debt if the interest of the estate requires it; he is obliged to act as a discreet and prudent man would, were the debt his own. *Id.*

4. — *Claim of executor against estate — when too late to raise objection that it is not referable.* Where a claim made by one executor against the estate of his testator, has been rejected by his co-executors, and the same has, upon a stipulation and agreement approved by the surrogate, been referred to a referee to hear and determine, and a judgment in favor of the claimant has been entered upon his report, it is too late to raise the objection that the claim of an executor is not referable (§ 33, 2 R. S., 86), but must be heard by the surrogate in person.

MATTER OF WELLER v. WELLER..... 195

5. — *Declarations of deceased.* In an action against executors to recover a debt due from their testator, his declarations are not admissible to show that he was not indebted to the plaintiff. *Id.*

6. — *Discretionary powers of, must be exercised by majority.* Where a discretionary power is given to executors to withhold payments to certain children of the testator, it must be exercised by a majority of the executors.

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7. — *Letters of administration — representative character proved by.* Where a plaintiff sues as administratrix, her representative character is sufficiently established by the production in evidence of letters of administration, issued in proper form by any officer having jurisdiction. *PARHAN v. MORAN*, 717

8. — *Code, § 399 — Conversations with deceased — when inadmissible.* Where, in an action brought by one to whom letters of administration have been duly issued, the defendant claims that the person alleged to be dead is still alive, he cannot be allowed to testify as to conversations had with the alleged intestate, prior to the issuing of the letters of administration, which conversations tend to show that such person is still living. *Id.*

— *When executors entitled to rents of realty devised.*

See SHUMWAY v. HARMON..... 411

— *Action against both heirs and devisees to recover payment of claim out of real estate of deceased debtor — when may be maintained — Judgment against executors — effect of, in such action.*

See ROCKWELL v. GEERY..... 606

— *What must be alleged and proved, in order to charge executor as trustee of personal estate.*

See CHIPMAN v. MONTGOMERY..... 739

— *Note of married woman — when charged against her share of payee's estate.*

See WALLACE v. STORRY..... 791

EXEMPTION — 1852, chap. 282, limiting exemption from taxation — construction of words "religious society" and "exclusively the property" in — when society entitled to exemption and can maintain action to have taxes declared void.

See *HEBREW FREE SCHOOL ASSOCIATION v. MAYOR*. 446

EXPRESS COMPANY — Receipt of — when expresses contract between parties.

See *HUNTINGTON v. DINSMORE*. 66

EXTRA ALLOWANCE — May be granted though no trial be had.] In difficult and extraordinary cases an additional allowance may be made under section 809 of the Code, where the plaintiff discontinues the action before trial on payment of costs. *COFFIN v. COKE*. 616

— When not granted — *Laches*.

See *BOARD OF COMMISSIONERS OF PILOTS v. SPOFFORD*. 74

FALSE IMPRISONMENT — Special damages proved on trial though not alleged in complaint — when judgment not reversed for such error.] 1. This action was brought to recover damages for the false imprisonment of the plaintiff by the defendant. Upon the trial, the plaintiff was allowed to prove the effect of his arrest upon his business, although no special damages were alleged in the complaint. *Held*, that the judgment would not be reversed for this error; that as special damages do not constitute a distinct cause of action, but only tend to increase the recovery, that the complaint could be amended at the trial by adding the necessary allegations and that the General Term would in furtherance of justice, consider it so amended. *CLEMONS v. DAVIS*, 260

2. — *Justice of the Peace* — liability of, for issuing warrant on defective affidavit.] The defendant, a justice of the peace, issued a civil warrant for the arrest of the plaintiff, upon an affidavit which failed to state that plaintiff was a resident of the county and not a freeholder, when in fact he was a resident of the county and a freeholder. *Held*, that the justice acted judicially in passing upon the sufficiency of the affidavit, and that he was not liable to an action for false imprisonment for causing the arrest of the plaintiff.

HARRISON v. CLARK. 685

— When officer protected in executing warrant.

See *SMITH v. WARDEN*. 787

FALSE PRETENSES — When obtaining property by artifice is larceny.

See *WEYMAN v. PEOPLE*. 511

FERRY FRANCHISE — Right of municipal corporation to sell real property used in connection with ferry franchise

See *PEOPLE v. CITY OF ALBANY*. 675

FIRE MARSHAL — Investigation by, as to origin of fires — chap. 563, 1868, providing for, not repealed.] 1. Chapter 563, Laws of 1868, creating the office of metropolitan fire marshal, giving him power to administer oaths, and providing that false swearing in any matter or proceeding before him should be deemed perjury, and be punishable as such, has not been repealed by the

• subsequent statutes in relation to such officer. *HARRIS v. PEOPLE*. 1

2. — Assertion of owner as to value of property — proper subject of investigation.] Upon an inquiry by the fire marshal into the origin and cause of a fire, where suspicion exists against the witness, who was the owner of the property, such owner's assertion as to the value of the property contained in the premises at the time, is a proper subject of investigation. *Id.*

FORECLOSURE — When resale not ordered for irregularity.] 1. A court of equity will not order a resale of premises under a mortgage foreclosure for an irregularity in form, when it is apparent that the purchaser cannot be injured by it. *KNIGHT v. MOLONEY*. 88

2. — When purchaser not relieved from bid for irregularity by which he is not injured.] On a mortgage foreclosure, in which both the purchaser at the sale had thereunder and his wife were parties, the wife, being an infant, appeared by attorney. The purchaser, having paid ten per cent at the time of sale, refused to complete the purchase, on the ground that the interests of his wife

FORECLOSURE—*Continued.*

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in the premises were not foreclosed. *Held*, that, as the effect of the conveyance to him would be to give the wife the same interests which would have been foreclosed had she properly appeared in the action, he was not injured by the irregularity complained of and was bound to complete the purchase. *Id.*

3. — *When purchaser charged with expense of resale.*] A resale having been ordered on his refusing to pay the residue of the purchase-money, *held*, that he should be charged with the expenses thereof, but not with the expense of proceedings taken to cure the irregularity in the foreclosure as to his wife's interests in the premises. *Id.*

4. — *Sale of mortgaged premises*—2 R. S., 193, § 165.] Upon the foreclosure of a mortgage covering several houses, the court has power to direct a sale of all the property therein described, though the amount due upon the mortgage might be raised by a sale of a portion thereof. *DEFOREST v. FARLEY*..... 640

5. — *Judgment—irregularity in, as to amount due—how corrected.*] Where, in an action brought to foreclose a mortgage, the referee's report states the amount due at the time of the commencement of the action, and that due at the date of his report, before which latter date a payment of principal fell due, under the provisions of the mortgage, and the judgment sets forth the latter amount as due, the remedy of the defendant is by motion to correct the judgment and conform the same to the report, and not by an appeal therefrom. *WALBRIDGE v. JAMES*..... 798

6. — *Remedy, where referee is not duly appointed by judgment to make sale.*] Nor will a judgment be reversed and a new trial granted, on the ground that the referee was not duly appointed, by fit and proper words in the judgment, to make the sale. The remedy of the party aggrieved is by motion at Special Term. *Id.*

7. — *Sale in—when purchaser not relieved from bid on account of defects in title.*] The purchaser at a mortgage foreclosure sale cannot refuse to carry out his purchase on account of defects of title prior to the execution of the mortgage foreclosed. It is the equity of redemption that is cut off by the sale; that is all that the law authorizes to be done, and the purchaser is bound to know, when he bids, that he is getting nothing else.

FRYER v. ROCKEFELLER..... 800

— *Referee's fees on sale in*—1869, chap. 192; 1874, chap. 1'2.

See PHILIPS v. WALKER..... 645

FOREIGN CORPORATION—*Service of process upon.*] 1. At common law, process against a corporation must be served on its head or principal officer, within the jurisdiction of the sovereignty where the artificial body exists.

Under the statutes of this State, service within this State on the proper officer of a foreign corporation, is equivalent to personal service on a non-resident natural person. If such personal service cannot be made, service may be made by publication against corporations in the same cases in which it can be made against non-resident individuals.

BARNETT v. CHICAGO AND LAKE HURON R. R. Co...... 114

2. — *Judgment against—effect of.*] A judgment recovered in an action commenced against a foreign corporation under the provisions of the Revised Statutes (2 R. S., 458, 459; Laws 1842, chap. 197) binds only the property of the corporation within this State, and has no extra-territorial force.

Effect of judgment against a non-resident corporation which has no property within this State discussed.

The provisions of the Code in respect to the "provisional remedy" of attachment, and to the entering of judgment, apply alike to non-resident individuals and to foreign corporations. *Id.*

3. — *Jurisdiction of action against.*] This court has jurisdiction of an action, in which the plaintiff is a resident of this State and the principal defendant a corporation created and existing under the laws of the State of Wisconsin, brought to procure the sale of certain bonds delivered by the corporation as collateral security for the payment of promissory notes made by it.

FOREIGN CORPORATION — Continued.

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By the agreement under which the bonds were transferred as security, the party of the second part was, in case of any default on the part of the corporation, authorized to sell the bonds upon giving certain notice therein specified. *Held*, that this stipulation simply conferred the right to sell and prescribed the mode in which the sale could be summarily made, without either expressly or by reasonable implication excluding other lawful proceedings for the attainment of the same object.

COFFIN v. CHICAGO AND NORTHERN PACIFIC CONSTRUCTION Co. 625

— *Stockholders in, cannot be taxed personally on stock owned by them.*

See PEOPLE EX REL. TROWBRIDGE v. COMRS. OF TAXES. 595

FORGERY — *When form of instrument is prescribed by statute, making an instrument in any other form, though like the genuine, is not forgery.*

See CUNNINGHAM v. PEOPLE. 455

FORMER ADJUDICATION — *Fraud — release avoided by — evidence of — neglect to give such evidence in action brought to recover the debt — action to set aside release cannot thereafter be maintained.] All controversies respecting the subject-matter of a litigation must be determined in one action, and if the defense of fraud in obtaining a release be not set up in the action brought for the debt, and in which such release is pleaded in bar, an action to set aside such release for fraud cannot be maintained.*

DAMBMAN v. SCHULTING. 50

FRAUD — *Release obtained by — avoided by proof of fraud.] Fraud invalidates all instruments, however solemn; and the effect of a release pleaded in an answer to an action prosecuted for the debt, may be avoided by proof that it was fraudulently procured.* DAMBMAN v. SCHULTING ... 50

— *Guarantor may prove fraud in principal as a defense to his liability.*

See PUTNAM v. SCHUYLER. 166

— *Promissory note procured by — when fraud a defense against bona fide holder.*

See FENTON v. ROBINSON. 253

— *Action for — when counter-claim inadmissible in — evidence — acts and sayings of either of two parties jointly guilty of fraud, admissible.*

See MILLER v. BARBER. 802

— *When material issue in action to recover value of goods sold, when sale was induced by fraud.*

See REID v. MARTIN. 590

— *Authority to act in name of firm obtained by — when fraud no defense.*

See MERCHANTS' BANK OF CANADA v. HOLLAND. 420

— *Contract obtained by — remedy of party defrauded.*

See VAN LIEW v. JOHNSON. 415

FRAUDULENT AGREEMENT — *Agreement to pay individual debts of partner with partnership assets — when fraudulent as against creditors.*

See LESLIE v. RUGG. 410

— *Remedy of party defrauded.*

See VAN LIEW v. JOHNSON. 415

FRAUDULENT CONCEALMENT — *Of facts, by which party is induced to accept bill of exchange — liability for.*

See MARCH v. FIRST NAT. BANK. 466

FRAUDULENT CONVEYANCE — *Sale by sheriff instead of receiver — when proper.*

See KENNEDY v. BARANDON. 642

GUARANTEE — *When personal.] The defendant guaranteed the payment of a certain bond and mortgage "to Arthur Childs, the present owner and holder of said bond and mortgage, his executors and administrators;" held, that the guarantee was a personal one confined to Childs, his executors and*

GUARANTEE — *Continued.*

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administrators, and that the assignee of the bond and mortgage could not maintain an action thereon. *SMITH v. STARR*..... 123

— *Guarantor may prove fraud in his principal as a defense to his liability, but not invalidity of instrument or incapacity of his principal.*

See *PUTNAM v. SCHUYLER*..... 166

HEIRS — *Meaning and effect of use of word "heirs."*

See *THURBER v. CHAMBERS*..... 721

— *When, cannot maintain action for construction of will.*

See *CHIPMAN v. MONTGOMERY*..... 739

HEIRS AND DEVISEES — *Action against, to enforce payment of claim out of real estate of deceased debtor — When may be joined as parties defendant.*] 1. In an action brought to recover payment of a claim out of real estate belonging to the estate of a deceased debtor, heirs at law and devisees may be properly joined together as parties defendant, if the complaint allege that the real estate which passed to the heirs at law is insufficient to satisfy the claim; and in such case the judgment may be so framed as to direct that the estate which descended to the heirs at law be first exhausted.

The fact that a disputed, litigated claim remains in the hands of his executors, does not prevent a creditor from proceeding against the heirs and devisees of the deceased. The fact that subsequently to the commencement of proceedings against the heirs and devisees, the executors recovered judgment in the matter thus in litigation, and sales were had thereunder, in partial satisfaction thereof, does not defeat the proceedings.

ROCKWELL v. GEERY..... 606

2. — *Judgment against executors — effect of, in such action.*] If a judgment is recovered against executors it has the effect of reducing to the amount of such judgment the claim against the deceased when it is sought to be satisfied out of real estate in the hands of his heirs and devisees, although such claim may be proved, in the proceeding against the heirs and devisees, to exist for a greater amount than the judgment. The true basis of apportionment in such cases, is the value of the respective pieces of real estate at the time of the death of the testator. *Id.*

HIGHWAY — *Dedication depends on user — 1 R. S., 501, § 1, sub. 3 — Order of commissioners as to road being used as highway for more than twenty years — when not conclusive as to person claiming highway is a private road.*

See *COLE v. VAN KEUREN*..... 262

— *Legislature has power to locate and open, without instrumentality of commissioners.*

See *PEOPLE EX REL. KILMER v. McDONALD*... 187

HUSBAND AND WIFE — *Services of wife belong to husband and he alone can sue for them.*

See *BEAU v. KIAH*..... 171

INADEQUATE DAMAGES — *Remedy for.*

See *CARPENTER v. BEARE*..... 509

INDECENT EXPOSURE — *Indictment for — when joint conviction may be had — what is "public place."*

See *PEOPLE EX REL. LEE v. BIXBY*..... 636

INDIAN RESERVATION — *Cutting and removing timber from — when illegal.*

See *SENECA NATION OF INDIANS v. HAMMOND*..... 417

INDICTMENT — *Perjury committed on examination before fire marshal — when may be charged in different ways in different counts.*] 1. The plaintiff in error was convicted of perjury, committed by him in the course of his examination before the fire marshal of the city of New York. The indictment contained two counts, one alleging perjury in the oral testimony given before the fire marshal, and the other alleging perjury in swearing to an affida-

INDICTMENT — *Continued.*

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vit before that officer, containing, in substance, the same allegations. *Held*, that the indictment was good. Though different felonies cannot be charged in different counts, yet the same felony may be charged in different ways in different counts, to meet the facts of the case. *HARRIS v. PEOPLE*. 1

2. — *Variance — when not fatal.*] The second count of the indictment charged the plaintiff in error with having sworn falsely in his affidavit, "of and concerning several necessary and material matters contained therein, in substance and to the effect following, that is to say," etc. The affidavit set out in the indictment stated that there were on the premises 60,000 cigars, while the affidavit produced upon the trial stated that there were 65,000 thereon. *Held*, that the variance was not fatal; that where an oath is set out "in substance and to the effect following," a literal copy is not required. *Id.*

— *For perjury in making affidavit annexed to claim against municipal corporation — what must be averred in.*

See ORTNER v. PEOPLE. 828

— *Selling liquor without license — indictment need not state name of street or number of house where offense was committed.*

See SCHWAB v. PEOPLE. 520

— *When deemed abandoned by removal of case from General Sessions to Special Sessions.*

See PEOPLE EX REL. WALKER v. SPECIAL SESSIONS. 441

INDORSER AND INDORSEE — *Authority to indorse note, which is unknown to holder — liability to bona fide holder where authority is exceeded.*

See HOTCHKISS v. ENGLISH. 869

— *Indorser — when discharged by extension of time of payment.*

See BEARD v. ROOT. 356

— *Collateral security — improper disposition of — burden of proof.*

See VOSE v. YULEE. 628

— *Indorser — when liable on altered note.*

See NAT. STATE BANK v. RISING. 798

INFANT — *Statute of limitations — § 110 of Code inapplicable to parol ratification of contract of — When cause of action arises on contract of.*

See HALSEY v. REID. 777

INJUNCTION — *When granted at suit of bondholders, to prevent railroad company from diverting property.*] 1. This action was brought by the holders of certain railroad bonds, secured by a mortgage — which provided that all property subsequently acquired by the company should become part of the property covered thereby — to restrain the fraudulent diversion of certain iron rails (subsequently acquired by the company), under a resolution of the board of directors authorizing one of the trustees of the mortgage to sell, pledge or dispose of the same, for the purpose of raising money to meet past and future estimates for the construction account of the extension of the road. *Held*, that the plaintiffs were entitled to maintain the action, and that a temporary injunction was properly granted therein.

WEETJEN v. ST. PAUL AND PACIFIC R. R. Co.. 529

2. — Part of the iron had, before the commencement of this action, been pledged with firms, of which the said trustee was a member, to secure advances made thereon to the road. *Held*, that the knowledge of the trustees was the knowledge of the firms, and that they could not claim to hold the iron as *bona fide* purchasers without notice. *Id.*

3. — *When refused on account of laches in applying for.*] The charter of the defendant (chap. 269 of 1857, as amended by chap. 346 of 1863), authorized the board of trustees to declare vacant the place of any trustee who should refuse or neglect to attend six regular meetings. At a meeting of the board held August 5th, 1863, a resolution was passed declaring the place of the plaintiff vacant, for not attending six regular meetings. He had then been absent from three successive meetings, and from that time until May 18th, 1874, he never attended a meeting or claimed to act as a trustee. This

INJUNCTION — Continued.

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suit was commenced to restrain the defendant from preventing him from acting as such trustee, and from filling his place in the board. *Held*, that he had slept too long on his rights, if he had any, to justify the granting of a temporary injunction.

VAN RANST v. N. Y. COLLEGE OF VETERINARY SURGEONS..... 620

4. — *To restrain party from proceeding in action — when improperly granted.*] In 1870 the W. and F. R. R. Co. executed a mortgage upon their road for \$125,000 to the Union Trust Company, as trustee. In 1872, desiring to increase their funded debt, another mortgage for \$175,000, described as a first mortgage, was executed to the appellant, the company intending to take up the \$125,000 mortgage. This project failed, as some of the holders of the first bonds refused to surrender them. Subsequently the property of the road was sold under a judgment and a new company organized. An action was then commenced by the appellant, the trustee of the second mortgage, to foreclose it, the new road and the Union Trust Company being made parties to the suit. The plaintiff, the holder of some of the bonds issued under the second mortgage, applied for and obtained an injunction restraining the appellant from proceeding in that action until he procured the surrender of all the bonds issued under the first mortgage. *Held*, that the injunction was improperly granted and should be vacated. WAIT v. WELLER..... 626

5. — *When the public only can apply for.*] Chapter 160, Laws of 1873, confers upon the corporation thereby created the right to extend its tracks to the North river at the foot of Christopher street.

Chapter 301, Laws of 1873, did not confer upon the plaintiff any exclusive rights, nor did it confer upon it the power or duty of interfering to protect the public interest either in behalf of the city or of the general public. If the defendant had no right to run its tracks to the foot of Christopher street, the public alone could interfere to restrain it by injunction, unless the defendant had actually interfered with the tracks of the plaintiff at that point, or was about to do so.

CHRISTOPHER AND TENTH ST. R. R. Co. v. CEN. CROSS-TOWN R.R. Co., 630

— *When granted at suit of stockholder to enjoin corporation from transferring its property.*

See KELLY v. MARIPOSA LAND AND MINING CO... 632

— *Restraining use of firm name and monograms — when granted.*

See DEVLIN v. DEVLIN..... 651

INQUEST — *Order opening and directing costs to abide event — when plaintiff not entitled to costs if he recover less than fifty dollars.*

See NEW v. ANTHONY..... 52

INSOLVENT DEBTOR — *Discharge of, from imprisonment — publication of notice necessary to give jurisdiction.*

See PEOPLE EX REL. LEWIS v. DALY..... 641

INSURANCE — *Breach of warranty must be pleaded.*] 1. In order to avoid a policy of insurance on the ground of a breach of warranty, such breach should be pleaded. BOOS v. WORLD MUT. LIFE INS. CO..... 133

2. — *Policy — when avoided by sale of property.*] This action was brought upon a policy of insurance, issued by the defendant, which contained a clause providing that "if the property be sold or transferred, or any change take place in title or possession, except in case of succession by reason of the death of the assured, whether by legal process or judicial decree or voluntary transfer or conveyance, * * * the policy shall be void." After the issuing of the policy, the plaintiff conveyed the property insured thereby to Winn & Weaver, who held a mortgage thereon, by whom an agreement was executed, giving to the plaintiff possession of the property for one year, and also the option to pay \$13,500 during said time, "as a consideration for the reconveyance. If payment not made, said property is to become fully vested" in Winn & Weaver. *Held*, that the transaction was a sale, and not a mortgage, and that the policy was avoided thereby.

TATHAM v. COMMERCE INS. CO..... 136

INSURANCE—*Continued.*

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3. — *Policy—when not invalidated by suicide of insured.*] In an action upon a policy of insurance taken out upon the life of a husband, for the benefit of his wife, the suicide of the insured is not a defense where there is no stipulation to that effect in the policy.

The expression, in a policy of life insurance, "in the known violation of the law of any State," cannot be construed to include suicide.

PATRICK v. EXCELSIOR LIFE INS. CO. 263

4. — *Policy—power of general agent to waive conditions in.*] A general agent of an insurance company may waive the performance of a condition inserted in the policy for the benefit of the company.

VAN ALLEN v. FARMERS' JOINT STOCK INS. CO. 418

5. — *Parol waiver of conditions, when policy in terms provides for written waiver only.*] A parol waiver of a condition in a policy is good, notwithstanding a provision in the policy that nothing but a written agreement, signed by an officer of the company, shall have that effect. *Id.*

6. — *Evidence.*] A policy of insurance is properly admitted in evidence in an action brought to recover thereon, although the application therefor is not produced. CUSHMAN v. U. S. LIFE INS. CO. 783

7. — *Evidence—conversations between witness and administrator.*] A conversation had between a witness and the administrator of a deceased person, prior to such decease and the administrator's appointment, in regard to such deceased person, is not admissible in evidence in an action brought to recover upon a policy of insurance issued upon the life of the deceased. *Id.*

8. — *Statements contained in application for policy—when must be shown fraudulent.*] Where the papers show that the understanding of the parties was that the statements contained in an application for insurance, were not to be regarded as warranties, but representations only, it is necessary, in order to establish the invalidity of the policy, to show that such statements are fraudulent or untrue in a material matter. *Id.*

9. — *Warranty—what is.*] A warranty is a statement on the literal truth of which the validity of the policy of insurance depends. *Id.*

10. — *Power of agent to waive conditions of policy.*] A general agent of an insurance company may waive payment of the premium when due and thereby bind the company. The existence and validity of the contract being conceded, an agent may waive or disregard conditions therein without destroying its vitality. SHEAR v. PHOENIX MUT. LIFE INS. CO. 800

INTEREST—*When action for, cannot be maintained.*] A creditor who has received the principal debt as such in full, cannot thereafter maintain an action for interest. TENTH NAT. BANK v. MAYOR. 429

INTOXICATING LIQUORS—*Action against vendor of, under chap. 646, 1873—when does not lie.*

See HAYES v. PHELAN. 738

JOINT-STOCK COMPANIES—*Individual liability of members of—When treated as partnerships.*] 1. In the absence of any legislation regulating the liability of members of voluntary joint-stock companies or associations, they are to be treated as partnerships, and the members are individually liable for the debts of the association. MOORE v. BRINK. 402

2. — *Right of creditors to sue stockholders individually.*] By the provisions of chapter 258 of the Laws of 1849, as amended by chapter 153 of the Laws of 1853, the right to sue the members or stockholders individually, after judgment and execution against the company, is reserved to its creditors. *Id.*

3. — If one of the members die, the creditor must first pursue his remedy against the survivors. *Id.*

JUDGMENT—*Lien of, as against subsequent mortgage—purchase-money mortgage—party advancing money to pay for land under an agreement that it should be secured by mortgage thereon.*] One Reese, who held a contract for the purchase of certain land, applied to the plaintiff, whom he already owed \$500, for a loan of \$500 more, to enable him to pay up his contract, agreeing

JUDGMENT — *Continued.*

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to secure the whole amount, \$1,000, by a mortgage to be executed upon the land as soon as it was conveyed to him. The day after the land was conveyed to Reese he deposited the deed with the plaintiff to hold as security for the \$1,000, and about a year afterward executed a mortgage to him for that amount. The mortgage and deed were recorded the same day. Prior to the date of the conveyance to Reese, one Adams had recovered a judgment against Reese. *Held* (1), that as to the \$500 advanced for the purchase of the land, the lien of the mortgage was prior to that of the judgment; (2), that as to the prior debt of \$500, included in the mortgage, the judgment was entitled to priority. *RAY v. ADAMS*..... 333

— *In action against receiver personally — when may be amended on appeal so as to be against defendant as receiver only.*

See *CAMP v. BARNEY* 373

— *In action to recover value of goods sold, where sale was induced by fraud — when not deemed to have been recovered on contract.*

See *REID v. MARTIN* 590

— *Action to set off debt against — when cannot be maintained.*

See *BUTLER v. WEHLE* 54

— *Against foreign corporation — binds only its property within this State — Provisions of Code as to entry of, apply to foreign corporations.*

See *BARNETT v. CHICAGO AND L. H. R. R. Co.* 114

— *Arbitration, pending appeal from, of matters determined by — effect of.*

See *BALDWIN v. BARRETT* 119

— *In ejectment — who bound by.*

See *THOMPSON v. CLARK* 164

— *Against obligee in bond of indemnity — when only prima facie evidence.*

See *CHAPIN v. THOMPSON* 779

— *Conclusive as to matters adjudicated — When not invalidated by neglect to enforce right by writ of possession.*

See *CAGGER v. LANSING* 812

— *On referee's report as to amount due in foreclosure action — how irregularity in, corrected — remedy, where referee was not duly appointed by judgment to make sale.*

See *WALBRIDGE v. JAMES* 798

— *Notice of entry of, required by § 848 of Code before commencement of action upon undertaking — when sufficient.*

See *ROGERS v. SCHMERSAHL* 623

JUDICIAL ACTS — *Justice of peace — when not liable in action for false imprisonment for issuing warrant on defective affidavit.*

See *HARRISON v. CLARK* 685

JURISDICTION — *Of State court of action by United States to recover unpaid duties.* 1. Where an action is brought in a State court by the United States for the recovery of duties unpaid on imported goods, the primary object of the action being not simply to execute the laws of the United States but to collect a debt by enforcing an obligation due to it, the court has jurisdiction of the cause of action.

Whether a State court can entertain an action brought simply to enforce the laws of the United States not decided. *UNITED STATES v. GRAFF*..... 634

2. — The principle of implied contracts is applicable to the payment of duties under the United States internal revenue statutes. *Id.*

— *Of action against foreign corporation.*

See *COFFIN v. CHICAGO AND NORTHERN PACIFIC CONSTRUCTION Co.*, 625

— *Discharge of imprisoned debtor — publication of notice necessary to give jurisdiction.*

See *PEOPLE EX REL. LEWIS v. DALY* 641

— *Execution issued by justice of the peace — need not show on its face that justice had jurisdiction.*

See *FIELD v. PARKER* 349

JUSTICE'S COURT — *Title to land—when not brought in question.*] 1. Where, in an action, a deed is put in evidence for a collateral purpose, it does not bring in question the title to land. *CLOW v. VAN LOAN* 184

2. — *Complaint—duty of justice to allow amendment of.*] In a proper case the statute (Code, § 64, sub. 11) makes it the imperative duty of a justice to grant an amendment upon proper terms. The word "may" in the statute means "shall." *WOOD v. SHULTIS* 809

3. — *Execution—need not show on its face jurisdiction.*] An execution issued by a justice of the peace who has general jurisdiction to issue executions in his court, need not state facts necessary to give the justice jurisdiction of the action in which the judgment upon which it is issued is entered. *FIELD v. PARKER* 842

JUSTIFICATION — *Of sureties in undertaking on appeal—how waived.*
See GOPSILL v. DECKER 625

LACHES — *When injunction refused on account of.*
See VAN RANST v. N. Y. COLLEGE OF VETERINARY SURGEONS 620

— *Relaxation of costs—motion for, denied on ground of.*
See PENFIELD v. JAMES 69

LANDLORD AND TENANT — *When landlord, and not tenant, liable for dangerous condition of demised premises.*] 1. The owner of property which is in a dangerous condition when it is leased, is responsible for injuries resulting to a third person by reason of such owner's failure to put the property in proper condition. *WHALEN v. GLOUCESTER* 24

2. — 1860, chap. 345 — *when tenant cannot surrender premises and refuse to pay rent.*] A tenant who, by his lease, agrees to make all necessary repairs, cannot surrender the possession of the premises and refuse to pay rent, on the ground that the walls of the house were unusually damp, and that in consequence thereof his family became and remained sick for some time.
TRUESDELL v. BOOTH 106

3. — *Lease—extension of—surrender of—what constitutes.*] This action was brought to recover rent, alleged to be due upon a sealed lease, whereby the defendant leased of the plaintiff certain premises for the term of three years from January 1, 1869, with the privilege of three years more, after the termination of the first term. The defendant entered and occupied the premises for fifteen months; he then, having paid the rent to that date, left the premises, one Kinny being in possession with plaintiff's knowledge. Kinny continued to occupy, paying rent to the plaintiff till May 8, 1872, when he left, delivering the key to the plaintiff, who accepted it and subsequently rented a portion of the premises. *Held* (1), that the holding over of Kinny did not constitute an election on the part of the defendant to extend the term; (2), that accepting the key and re-renting the premises was a surrender and termination of the lease, at least from the time of the re-renting, if not from the time of accepting the key. *MOORE v. MCCARTHY* 261

4. — *Tenancy from month to month—when created—no notice required for termination of.*] Under a lease providing that the term of letting and hiring is for one month only, and will expire at noon on the first day of the following month, a tenancy from month to month is created, and neither party is bound to give any notice to the other in order to terminate it.
GIBBONS v. DAYTON 451

— *Counter-claim in action for rent—when damages for breach of contract by landlord may be set up as.*
See WALKER v. SHOEMAKER 579

LARCENY — *Possession of property obtained by causing owners to send it to fictitious persons—hearsay evidence as to existence of persons claimed to be fictitious.*

See WIGGINS v. PEOPLE 540

— *Obtaining property by artifice—when constitutes larceny.*
See WEYMAN v. PEOPLE 511

LATERAL SUPPORT— *When owner of adjoining lands estopped from asserting right to— Effect of deed with habendum "to the uses and purposes" of a railroad.* The plaintiff conveyed certain land to the defendant, "for materials," "to have and to hold * * * to the uses and purposes of said railroad, and for no other or different purpose." It was understood by the parties that a part of the land was taken as a source from which to obtain material for other portions of the railroad. By reason of the excavation made for that purpose on such part, the other land of plaintiff was deprived of its lateral support, and slid into the excavation. *Held*, in an action brought to recover damages sustained by plaintiff by reason of such slide, that she was estopped from claiming the right to the lateral support by her deed, which contemplated the use made of the land by the defendant.

LUDLOW v. HUDSON RIVER R. R. Co. 239

LEASE— *Accepting key of leased premises, and re-renting them— when constitutes a surrender of lease— Extension of lease— what does not constitute.*

See MOORE v. MCCARTHY. 261

— *Of armories in city of New York— when city may show fraud between lessor and public officials as a defense— power of supervisors to make.*

See FALLON v. MAYOR. 583

FORD v. MAYOR. 587

— *When instrument constitutes a sale, and not a lease, of dower interest— State Constitution, art. 1, § 14.*

See RUTHERFORD v. GRAHAM. 796

LEGACY— *When does not lapse by death of legatee— distinction between postponement of payment for benefit of estate and such postponement with reference to situation of legatee.* 1. When the circumstances and condition of the legatees, and the circumstances of the estate and of the devisee, show that the time given for the payment of legacies was designed for the benefit of the estate, and not with reference to the circumstances or situation of the legatees, the legacies do not lapse by reason of the death of the legatees before the time of payment. LODER v. HATFIELD. 36

2. — *Action for sale to pay legacies— statute of limitations.* An action for the purpose of having a sale decreed by a court for the payment of legacies, is an equitable action, and must be brought within ten years after the cause of action accrued. *Id.*

3. — *In lieu of dower.* A legacy in lieu of dower abates like other legacies, and is not a charge upon the real estate, but is only entitled to a preference in payment from the personal estate over other legacies.

SANFORD v. SANFORD. 758

— *Gift over to second legatee— when valid.*

See BELL v. WARN. 406

LEGISLATURE— *Power of, to authorize issue of town bonds in aid of private corporation.*

See WEISBER v. VILLAGE OF DOUGLAS. 201

LEX LOCI CONTRACTUS— *Promissory note dated and payable in foreign State— when not usurious.*

See AGRICULTURAL NAT. BANK v. SHEFFIELD. 421

LIBEL— *In civil action— motive immaterial— truth of allegations complete defense— otherwise in criminal prosecutions.* The constitutional provision (§ 8, art. 1) that, in cases of libel, "if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted," applies only to criminal prosecutions.

In civil actions, where the truth of the alleged libel is pleaded in justification, it may be proved as a complete bar to the suit. In such cases the motive with which the publication was made is not material. The rule is the same in slander cases. GEORGE, THE COUNT JOANNES, v. JENNINGS. 66

LIEN — <i>When lien of mortgage is superior to that of prior judgment.</i> See RAY v. ADAMS	833
— <i>Mortgage—equities between mortgagees—how far subsequent purchaser bound by.</i> See GREENE v. DEAL	703
LIFE ESTATE — <i>When created by will—when court has power to appoint trustee for protection of tenants for life and remaindermen.</i> See LIVINGSTON v. MURRAY	619
LIS PENDENS — <i>Who affected by.] A lis pendens only relates to and affects voluntary alienations of property pending a suit in respect to it, by or from the defendant therein, and in no way affects independent parties asserting adverse rights in respect to it.</i> BECKER v. HOWARD	859
— <i>Notice of, in action of ejectment—who bound by.</i> See THOMPSON v. CLARK	164
MAINTENANCE — <i>Conditions in mortgage for support of mortgagee—when waived.</i> See MORRISON v. MORRISON	410
MALICE — <i>When implied in action for slander—when denial of, is immaterial.</i> See HARWOOD v. KEECH	382
MANDAMUS — <i>To town auditors—effect of adjournment.] Where, after the adjournment of a board of town auditors, an order is granted requiring them to show cause why a mandamus should not be allowed to compel them to allow a claim of the relator, the adjournment will prevent the enforcement of the peremptory writ against the members thereof; but where such writ will lie, it may issue to be enforced at the next lawful meeting of the board.</i> PEOPLE EX REL. WELLS v. BOARD OF AUDIT.	94
MANUFACTURE — <i>Contract for manufacture of tent—when not within statute of frauds—when right of action for price accrues.</i> See HIGGINS v. MURRAY	565
MARKET-PRICE — <i>How proved.] The market-price of goods is proved as well by evidence of what they could be bought for, as by actual sales.</i> HARRISON v. GLOVER	121
MARRIAGE — <i>When will revoked by.</i> See LATHROP v. DUNLOP	218
MARRIED WOMAN — <i>Services of, belong to husband, and he alone can sue for them.] 1. The plaintiff, a married woman, living with and keeping house for her husband, took care of her mother and sister, who were sick at the house of defendant, who promised to pay her for her services. Held, in an action brought by her to recover for such services, that she was properly nonsuited; as her services belonged to her husband, he alone could maintain the action.</i> BEAU v. KIAH	171
2. — <i>Contract by—when intention to charge the same upon her separate estate, must be expressed in.] Where a contract made by a married woman is not for the benefit of her separate estate, she is not liable thereon unless the intention to charge the same be expressed in the contract.</i> WEIR v. GROAT, 198	
3. — <i>Note made by, jointly with husband—when charged against her share of payee's estate.] In 1867, appellant and her husband gave their joint and several promissory note for \$1,000, payable five years after date, with interest, to the defendant's testatrix, her heirs or assigns. The husband died in 1871. After the death of the testatrix, the appellant promised her executor to pay the note. Held, that the amount of the note was properly charged against the appellant's share as a legatee under the will of the testatrix.</i> WALLACE v. STORRY	791
MASTER AND SERVANT — <i>Liability of master for not keeping in repair machinery used by servant.] It is the duty of a master to see that his servants</i>	

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shall be under no risks from imperfect or inadequate machinery; and he is liable for any injury which may arise from his neglect to keep the same in repair, as well as for any imperfection in its original construction.

KING v. N. Y. CEN. AND HUD. R. R. CO. 769

— *Liability of employer for laches of one contractor by which another is delayed in fulfilling contract.*

See COULTER v. BOARD OF EDUCATION. 569

MAYHEM — *Biting off lower portion of ear — when does not constitute crime of — Disabling must be done "on purpose" — Statements of complainant — when inadmissible.*

See BURKE v. PEOPLE. 481

MEASURE OF DAMAGES:

See DAMAGES.

MECHANICS' LIEN — *When personal judgment may be recovered by claimant.* 1. When, during the pendency of an action, brought for the foreclosure of a mechanics' lien, the lien expires by lapse of time, a personal judgment may be recovered by the claimant. GLACIUS v. BLACK. 91

2. — *Cancellation of contract by owner — effect of, on rights of sub-contractor.* The plaintiffs furnished certain materials used by one Phillips, in erecting a building upon land belonging to the defendant, Brown, and received an order upon her, which she accepted, to be paid out of the third payment to become due to the contractor, Phillips. Subsequently, and before the third payment became due, Phillips and defendant, Brown, canceled the contract. Afterward plaintiffs, in ignorance of such cancellation, filed a mechanics' lien under the act of 1862 (p. 947), for the enforcement of which this action was brought. Upon the trial, the plaintiffs were nonsuited. *Held*, that this was error; it should have been left to the jury to decide whether the contract was canceled in good faith, and, if not, how much was due upon it.

Quære, whether plaintiffs' lien would be affected by such cancellation.

JENES v. BROWN. 128

3. — *When relation of owner and contractor does not exist.* When an owner of land agrees to sell it to another, and advances him money with which to build upon the premises sold, and, after completion of the houses, the builder is to secure the purchase-price and the advances by mortgage, the relation of owner and contractor does not subsist as between the parties, under the lien act. In such cases the person who agrees to purchase, builds by permission of the owner, and the property is chargeable with the lien until the deed is actually delivered, without regard to the terms of the contract of purchase. GATES v. WHITCOMB. 137

4. — *Rensselaer County — Exemption of public buildings.* Chapter 778 of the Laws of 1866 (p. 9), establishing a mechanics' lien law for Rensselaer county, was not repealed by chapter 558 of the Laws of 1869, as amended by chapter 194 of the Laws of 1870.

Quære, whether the exemption from the lien law of the corporate property of a municipality used for a public use, established by the decision of *Brinkerhoff v. Board of Education* (6 Abb. [N. S.], 428), does not depend on the use actually made of the buildings, and not upon that for which they were intended. That is, whether the principle laid down in *Brinkerhoff v. Board of Education* would apply to a building not actually used for a public purpose, whatever the intention of the village might have been when the contract was made. VAN DENBURGH v. VILLAGE OF GREENBUSH. 795

MERGER — *Mortgage — when not merged.* The merger of a mortgage, when the fee of the mortgaged premises is acquired by the mortgagee, does not take place when such is not the intention of the parties to the transaction out of which it is claimed to arise. DAY v. MOONEY. 134

MISTAKE — *Of law — delivery of property through — when cannot be recovered back — Compromise.* 1. The defendant gave to his daughter, the wife of the plaintiff, certain articles of household furniture, which were brought by her to the plaintiff's house, she agreeing with the defendant, without the knowl-

MISTAKE — *Continued.*

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edge of the plaintiff, that in case she died without children, the property should be returned to him. Upon her death defendant demanded the property, and the plaintiff, after consulting a lawyer, delivered the same to him. Subsequently this action was brought by the plaintiff to recover the said property. *Held*, that the action could not be maintained.

TAPLIN *v.* WILSON 244

2. — *Money overpaid for land, under mistake as to quantity conveyed — when may be recovered.*] The plaintiff having agreed to purchase of the defendant certain land at a stipulated price per acre, a survey was made of the land, and the plaintiff paid the amount appearing thereby to be due from him. Subsequently it was discovered that the land did not contain the number of acres called for by the survey. *Held*, that the plaintiff was entitled to recover the amount paid by him through mistake, with interest thereon from the time of payment.

After the sale to plaintiff, the defendant sold the remainder of the land to third persons, relying upon the survey, thereby conveying to such persons more land than they were entitled to. *Held*, that the plaintiff was not thereby prevented from recovering the excess paid by him.

GRAVES *v.* BRINKERHOFF 305

— *Date of promissory note — mistake in, may be shown by parol, by indorsee as well as payee.*

See GERMANIA BANK *v.* DISTLER 633

MONEY PAID AND RECEIVED — *Money overpaid for land, under mistake as to quantity conveyed — when may be recovered.*

See GRAVES *v.* BRINKERHOFF 305

MORTGAGE — *Discharge of, from record under statute.*] 1. Chapter 365, of 1862, as amended by chapter 798, of 1868, as amended by chapter 551, of 1873, is designed to remove an existing incumbrance upon real estate, which has been paid in fact and not by mere presumption of law.

When a remedy is given by statute all the requirements imposed by it must be complied with. MATTER OF TOWNSEND 31

2. — *Payments by mortgagor to mortgagee after assignment — when valid.*] Payments made by a mortgagor to a mortgagee, after the latter has assigned the mortgage and parted with all his interest therein without notice of such assignment, are valid.

Under some circumstances the omission of a mortgagor, when paying off his bond and mortgage, to require a delivery up of the securities, may raise a presumption that the payment was not made in good faith. But no such presumption can arise where the assignee allows the mortgage to remain in the hands of the mortgagee, and permits him to receive payments of principal and interest thereon. VAN KEUREN *v.* CORKINS 129

3. — *Containing conditions for support and maintenance of mortgagee — when conditions waived.*] Where a mortgage is given conditioned for the support and maintenance of the mortgagee, and for the payment to him of a certain sum, weekly, a refusal on his part to receive such sum is a waiver of the condition, and the mortgagor is thereby discharged from performing the same. MORRISON *v.* MORRISON 410

4. — *Relief in action to foreclose such mortgage.*] In an action brought to foreclose a mortgage conditioned for the support of the mortgagee, no relief can be granted for a neglect to support after the commencement of the action. *Id.*

5. — *Assignment of, to escape taxation.*] This action was brought to recover the amount of a mortgage collected by the defendants, which had been assigned by the plaintiffs' intestate to the defendants' testator. The plaintiffs claimed that the assignment was invalid, for the reason that it was made to enable their intestate to escape taxation. *Held*, that the assignment was valid to pass the title to the mortgage, and that as the intestate had put his property out of his hands for the purpose of escaping taxation, the court would not help him to get it back. COX *v.* WIGHTMAN 799

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— When not merged though mortgagee acquires fee. See DAY v. MOONEY.....	134
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— Effect of tax sale upon prior mortgage— Chap. 427, 1855, §§ 76, 77. See BECKER v. HOWARD.....	359
— When railroad company restrained by injunction from diverting property covered by, at suit of bondholders. See WEETJEN v. ST. PAUL AND PACIFIC R. R. Co.....	529
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— Consideration. See HADEN v. BUDDENSICK.....	649
— See FORECLOSURE.	

MUNICIPAL CORPORATION— Bonds of, issued to aid private corporation— legislature cannot authorize issue of.] In pursuance of chapter 577, of the Laws of 1868, bonds were issued by the village of Douglas in payment of stock of the Long Eddy Hydraulic and Manufacturing Company, a private corporation created for the purpose of improving a water privilege and of manufacturing lumber in the said village. In an action brought upon said bonds, held, that the purpose for which the company was created was a private one, and that the legislature could not authorize the village to issue bonds in aid thereof. WEISMER v. VILLAGE OF DOUGLAS..... 201

2. — Payment of interest on bonds— estoppel.] After the bonds were issued, the interest due thereon was paid once, and the village once voted on its stock. Held, that the village was not thereby estopped from setting up the invalidity of the bonds in this action. *Id.*

3. — Presentation of claim to common council— when sufficient compliance with chapter 262, 1859.] A presentation of a claim against a municipal corporation to the common council thereof, is a sufficient compliance with chapter 262 of 1859, especially when the corporate powers are so distributed that the officer, who, from his duties, might be assumed to be the chief fiscal officer of the corporation, has no power to pay the claim if presented to him.

BUTLER v. CITY OF ROCHESTER..... 321

4. — Sidewalk— steepness of grade of— liability of city for injuries caused by.] The common council of the city of Auburn having established the grade for a portion of one of the sidewalks therein at three-quarters of an inch to the foot, it was found that, at the junction of the old with the new sidewalk, there was a difference of level of six inches; to obviate which, the common council directed that the stone joining the new with the old sidewalk be laid on a slope of six inches in about three and one-half feet. The plaintiff, in passing along the said sidewalk, at a time when the said stone was covered with about one inch of snow, slipped thereon, fell and was injured. Held, that it was negligence on the part of the city to have this stone so laid, and that it was liable to the plaintiff for the injuries sustained by her.

CLEMENCE v. CITY OF AUBURN..... 886

5. — When not liable for overflow of sewer.] This action was brought to recover damages sustained by the plaintiff in consequence of water setting back into his basement from a sewer constructed and maintained by the defendant. The overflow occurred on the 4th of July, 1872, and was preceded by a heavy rain, which conveyed so much sand into the sewer as to completely obstruct and prevent the water from passing through it. The evidence did not show it to have been in any manner obstructed before, nor was it improperly constructed or out of repair. Before the sand was washed into it, and after its removal, it appeared to be sufficient to carry off the water flowing into it. Held, that the defendant was not liable. SMITH v. MAYOR.. 687

6. — Right of, to sell its property, franchises, etc.— when court of equity will interfere.] Although a city, in a certain sense, holds all its property, fran-

MUNICIPAL CORPORATION — *Continued.*

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chises and powers in trust for its inhabitants, yet such property may be sold and conveyed by it, except where the property has been conveyed to it in trust for a specific purpose within its proper province, in which case a court of equity will interfere to prevent a misappropriation of the fund or a misuse of the property. *PEOPLE v. CITY OF ALBANY*..... 675

7. — *Real estate used in connection with ferry — when may be sold by corporation.*] Where the legislature has granted to a city the exclusive right to establish and control the ferries therein, and a ferry has been established and for a long time maintained at a particular point therein, the city may, at its pleasure, sell and convey the real estate owned by it in connection with such ferry to any person, provided the public be not cut off, by the sale, from the means of intercommunication. *Id.*

8. — *What property may and may not be sold by.*] All property of a private nature belonging to a corporation, upon which no specific trust is imposed, may be sold by the corporation; but property of a public nature, such as streets, etc., so long as they are held for the public use, cannot be sold. *Id.*

9. — *When may maintain action for injury to bridge.*] When a town acquires by legislative sanction, from a turnpike company, the right to maintain a bridge, such right becomes an easement, the property of the town, and the town may maintain an action to recover damages for injury caused to such bridge. *TOWN OF PIERREPONT v. LOVELASS*..... 696

MURDER — *When killing is murder in first degree, and not manslaughter, when adultery is the provocation.*

See SHUFFLIN v. PEOPLE..... 16

NATIONAL BANK — *Power of State court to order payment of money by, under § 294 of Code.*] Where a judgment has been recovered against an assignee in bankruptcy, an order cannot be made, under section 294 of the Code, requiring a bank, a depository of United States funds, to pay over to the judgment creditor money belonging to the estate of the bankrupt, deposited by the assignee with it. *HAVENS v. NAT. CITY BANK*..... 131

NEGLIGENCE — *Contributory negligence — care required of person working on railroad track.*] 1. Although, as to travelers about to cross a railroad track, it is negligence, as matter of law, not to look in both directions, in order to see whether a train is approaching, such rule cannot be applied to persons employed in performing certain work in and upon the tracks and road-bed.

OMINGER v. N. Y. CEN. AND HUD. R. R. Co...... 159

2. — *Agreement between railroad company and contractor, limiting liability — who not bound by.*] H. and M. agreed with the defendant to perform certain work for it, the contract providing that the defendant should not be liable for any injury sustained by the contractor, his sub-contractor, workmen or laborers, by reason of the negligence of the defendant, its agents or servants, in operating the railroad. The plaintiff, an employe of H. and M., was injured while working upon the track, and this action was brought by him to recover damages therefor.

Held, that as the plaintiff was not a party to the contract, and was not shown to have had knowledge thereof, he was not bound by the provisions contained therein, and that defendant was liable for the injuries sustained by him. *Id.*

3. — *Lessee of wharf — duty of, to persons unloading at.*] A lessee of a warehouse and the wharf in front thereof, who, for his own benefit, induces other persons to come there, is bound to keep his premises and the approaches thereto in suitable order for the business carried on there, and is liable to any person who is injured in consequence of any defect or obstacle, the existence of which could be discovered by a reasonable examination, commensurate with the use made of the premises. *LEARY v. WOODRUFF*..... 99

4. — *Starting train by sudden jerk, without warning to passenger.*] This action was brought to recover for injuries sustained by the plaintiff in leaving the cars of the defendant. The plaintiff claimed that after the train had stopped and he had reached the door of the car and was about to leave

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the same, the train was backed by a sudden jerk and with great force, without warning to him, and that he was thereby thrown out and injured.

Upon the trial the court charged that if, after the train had been stopped to enable passengers to alight, it was suddenly and without warning moved and the plaintiff thrown out and injured, the defendant was liable; that it made no difference whether it was a motion backward or forward which occasioned the injury. *Held*, that the charge was correct.

MILLIMAN v. N. Y. CEN. AND HUD. R. R. Co. 409

5. — *Railroad company—sudden escape of steam from engine frightening horse—liability of company—duty of company to person signaled by flagman to cross track.*] When a flagman who is stationed at a railroad crossing beckons a person waiting for an opportunity to pass, to cross the track, the person has a right to suppose that no change will take place in any thing under the control of the railroad company which will increase the danger, and the sudden increase in the escape of steam from a locomotive, such as to frighten his horse, makes the railroad company liable for the injuries resulting from it. BORST v. LAKE SHORE AND MICH. SO. R. Co. 846

6. — *Stopping engine at railroad crossing.*] *Seemle*, that stopping an engine on a railroad track where it crosses a public highway, in such a manner as partially to block up the highway, is an act of negligence. *Id.*

7. — *Contributory negligence—when justifies nonsuit.*] Except in very clear cases the plaintiff, in an action brought to recover damages for negligence, should not be nonsuited on the ground that his own negligence has contributed to bring about the injury. *Id.*

8. — *Fall of building caused by violent storm—liability of owner.*] An owner of land which adjoins a public street in a populous city, who suffers a building to remain thereon in an unsafe or dilapidated condition, is liable to a party sustaining damages by the falling of the wall of such building, although the fall of the wall may have been the result of a storm of unusual violence.

Failure on the part of the owner of a building to keep it in a safe condition, and resulting damages, throw upon the owner the burden of showing that the building was safe so far as diligent examination would show.

VINCETT v. COOK 818

9. — *Railroad company.*] When the evidence shows that a railroad company permitted people to acquire the habit of crossing its track frequently at a certain place, the company is not at liberty to allow cars to run over that portion of the track without any one to control them.

SUTTON v. N. Y. CEN. AND HUD. R. R. Co. 760

10. — *Railroad company—contributory negligence of passenger in leaving car before arriving at station.*] A train of defendant, upon which plaintiff was a passenger, ran a short distance beyond the station at which she wished to alight, stopped for a moment, and then backed down to the station. As soon as the train stopped, the plaintiff, who was in the last car, supposing it was at the station, and that it would remain there but a short time, without the knowledge of any one in charge of the train, left the car by the rear door, and was on the steps, getting off, when, by a sudden jerk of the train, made in backing to the station, she was thrown off and injured. It was a very dark night. There was no station platform or light where the plaintiff attempted to leave the car, nor at the usual stopping-place, which was across a highway in front of a hotel. The name of the station had not been announced, and no notice had been given to passengers to alight. The conductor saw the plaintiff after she fell, and made a signal with his lantern to stop the train, but it was not seen. There was no brakeman at the end of the car where plaintiff attempted to alight.

Held (1), that the defendant was not guilty of negligence; and (2), that plaintiff, by her negligence, contributed to the injury.

TABER v. DEL., LACK. AND WEST. R. R. Co. 765

11. — *Evidence.*] On the trial plaintiff was allowed to testify that she understood the train stopped at the station but a short time, and that the station agent's wife had so told her. *Held*, error. *Id.*

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- *In signing promissory note — question for jury.*
See FENTON v. ROBINSON 258
- *Sidewalk — when city liable for injuries caused by steep grade of.*
See CLEMENCE v. CITY OF AUBURN 386
- *Contract exempting common carrier from liability for — when sufficient.*
See NICHOLAS v. N. Y. CEN. AND HUD. R. R. Co. 327
- *Liability of master for not keeping in repair machinery used by servant.*
See KING v. N. Y. CEN. AND HUD. R. R. Co. 769
- *Contributory negligence in walking upon railroad.*
See ELWOOD v. N. Y. CEN. AND HUD. R. R. Co. 808

NEW TRIAL — *Grounds must be stated.*] 1. It is not error to deny a motion for a new trial when no grounds for it are stated; nor will the appellate court entertain questions raised there for the first time.

GEORGE, THE COUNT JOANNES, v. JENNINGS 66

2. — *In equity court — when not granted.*] Although courts of equity may and will, in proper cases, grant a new trial, in suits in which the judgment binds the plaintiff as to his inheritance in analogy to the statutory right of a defeated party in action of ejectment, yet such rule does not apply to an action brought by an heir at law against the widow of his deceased father to have the marriage declared void on account of the lunacy of the father at the time of the marriage, as a judgment therein sustaining the marriage, does not defeat the plaintiff's right as heir, but at most merely suspends his possession of a portion of the estate for the life of the defendant.

BANKER v. BANKER 259

— *The proceeding to obtain new trial for inadequate damages is same as that for excessive damages.*

See CARPENTER v. BEARE 509

— *When appeal from judgment of County Court may be taken, without first moving for new trial.*

See BEATTY v. MYERS 266

— *When no motion for, has been made, question of fact will not be considered on appeal.*

See NAT. STATE BANK v. RISING 798

NEW YORK BRIDGE COMPANY.] By chapter 601 of the Laws of 1874, the forfeiture of the charter of the New York Bridge Company, occasioned by its failure to complete the bridge within the time limited by law, was unconditionally waived. *MATTER OF N. Y. BRIDGE Co.* 635

NEW YORK CITY — *Leases of armories in — effect of § 2, chap. 758, 1878 — fraud between lessor and officials — when may be shown.*] 1. The only effect of section 2 of chapter 758, Laws of 1873, was to remove the prohibition against paying the arrears of rent upon leases of armories in the city of New York, created by section 2 of chapter 9, Laws of 1872, in the cases specified in the said section.

Such section did not take away legal defenses that existed by reason of the invalidity of such leases because made in violation of law, nor did it deprive the city or county of the right to allege fraud and collusion between the lessor and the public officials as a defense to actions upon such leases.

FALLON v. MAYOR 583

2. — *Leases of armories — authority of supervisors to make.*] The board of supervisors had no authority to make leases for armories and charge the county with the obligations thereby created, until all the requirements of the act of 1870 (chap. 86), had been complied with. *Id.*

3. — *Armories — power of supervisors to lease — chap. 80, 1870.*] The board of supervisors cannot lease buildings for armories simply because, in their opinion, they will sooner or later be needed for the use of some one or more of the regiments of the county. No power to make such leases exists, except upon compliance with all the requirements of section 120 of the military code. *FORD v. MAYOR* 587

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4. — *Ratification of lease made without authority—what is not.* [Occupancy of premises so leased, by one of the regiments of the national guard, and payment of rent from time to time by the officers of the city, cannot be treated as a ratification of a lease made without authority. *Id.*

5. — *Failure to publish resolution authorizing contract—effect of, on contract.* [This action was brought to recover the amount due upon a contract, the resolution authorizing the making of which had not been published as required by section 7 of chapter 448, Laws of 1867, before its adoption by the common council of the city of New York. *Held*, that the contract was void, and that the plaintiff was not entitled to recover. *MOORE v. MAYOR*. 545

6. — *Partial payment on such contract by city—when does not constitute ratification.* [The work provided for by the contract was performed and partially paid for by the city. *Held*, that these acts did not constitute a ratification of the contract by the city; they were the acts of its officers alone, who could bind it only by observing the requirements of the law affecting the proceedings. *Id.*

7. — 1870, *chap.* 137, § 20 — *publication required by—when must be made.* [Under chapter 137, of 1870, requiring the publication of certain ordinances and resolutions passed by the board of aldermen and assistant aldermen of New York, publication must be made of the resolution introduced or passed in the respective boards, and cannot be made before that time. It is not notice of the intention to introduce or pass it, but the fact that it has been introduced or passed which is to be published. *MATTER OF LEVY*. 501

8. — *Claims against town annexed to—when must be presented for audit.* [Under the provisions of the acts providing for the annexation of a portion of Westchester county to the city of New York, one who has a valid demand, duly certified, against a town therein, for the erection of a school-house, cannot maintain an action against the city thereon, until it has been audited by the board of education of the city of New York. *MCDONNELL v. MAYOR*. 473

9. — *Grade of streets—1867, chap. 697, refers to existing grades, whether established by law or not.* [The act (chap. 697 of 1867), authorizing the commissioners of Central park, New York, to alter and amend the present grade of any street, avenue or road, that might be retained by them, and to establish new grades for all other streets within a certain boundary, refers to the existing grade of any road or street used as such, although such grade may not have been formally established by any law or ordinance of the common council. *PEOPLE EX REL. DEVELIN v. ASTEN*. 461

10. — *Assessments—reference—power of court to order, on application made under chap. 312, 1874.* [In applications to vacate assessments under chapter 312, Laws of 1874, the court has power to refer the matter to a referee to take and report the testimony to the court. *MATTER OF BOHM*. 558

11. — *Assessments—when application to vacate can only be made for fraud or substantial error.* [When an assessment has been made to pay the compensation awarded for land taken to open streets in the city of New York, in pursuance of 2 Revised Laws of 1813, page 409, section 178, as amended by chapter 483, Laws of 1862, an application to vacate it under chapter 338, Laws of 1858 as amended by chapter 312 of 1874, can only be made for fraud or substantial error, in cases where no investigation could be had in the first instance or in the proceeding itself.

The statute does not apply to assessments imposed when no fraud is alleged, and when no error is urged other than that the land assessed is not subject to assessment. *MATTER OF FURNESS*. 624

12. — *Assistant alderman—Chap. 335, 1873, abolishing office of, is constitutional and valid.* [The power of the legislature over the office of assistant alderman in the city of New York, as it existed prior to the passage of the act of 1873, was unrestricted, except that during its continuance it could only be filled by election or appointment in the mode prescribed by section 2 of article 10 of the Constitution. Accordingly *held*, that chapter 335 of 1873, abolishing this office and transferring its powers and duties to the board of aldermen, was constitutional and valid. *DEMAREST v. WICKHAM*. 637

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- *Assessments* — 1857, chap. 446, § 7 — *when publication of notice required by, is sufficient* — 1872, chap. 580 — *power of court to vacate assessment for failure to publish notice.*
 See **MATTER OF AGNEW** 485
- *Fire marshal — investigation by, as to origin of fires — indictment for perjury committed on examination before.*
 See **HARRIS v. PEOPLE** 1
- 1870, chap. 187 — *publication of resolution for repayment in more than one newspaper, not required by.*
 See **MATTER OF CONWAY v. MAYOR** 43
- *Commissioners of Charities and Corrections — power of, to borrow money.*
 See **TENTH NAT. BANK v. MAYOR**..... 429
- *Streets — what constitutes dedication and acceptance for purposes of — Right of corporation to assess lots fronting on lands dedicated, for sewer.*
 See **MATTER OF INGRAHAM**..... 495
- *Excise law — § 15, chap. 628, 1857, is applicable to.*
 See **SCHWAB v. PEOPLE**..... 520
- *"Public officer" — who is not, within meaning of chap. 876, 1869, § 11.*
 See **SMITH v. MAYOR**..... 644
- 1872, chap. 438, § 1 — *clerks of District Courts — how appointed — tenure of office.*
 See **PEOPLE EX REL. HOGAN v. FLYNN**..... 647
- NONSUIT** — *Should be granted for contributory negligence only in very clear cases.*
 See **BORST v. LAKE SHORE AND MICH. SO. R. CO.**..... 346
- NOTICE** — *Of entry of judgment required by § 848 of Code, before commencement of action upon undertaking — when sufficient.*
 See **ROGERS v. SCHMERSAHL**..... 623
- NOTICE OF APPEAL** — *In proceedings for opening streets — upon whom served.*
 See **MATTER OF KINGSBRIDGE ROAD** .. 99
- OFFICER** — *When protected in executing process.*
 See **FIELD v. PARKER**..... 342
- *When protected in execution of warrant.*
 See **SMITH v. WARDEN** 788
- ORDER OF ARREST** — *Conversion — tort — when not waived by receipt of part of claim.*
 See **LAMBERTSON v. VAN BOSKERCK**..... 628
- ORDER OF PUBLICATION** — *Foreign corporation — jurisdiction of action against.*
 See **COFFIN v. CHICAGO AND NORTHERN PACIFIC CONSTRUCTION CO.**, 625
- PARTIES** — *Substitution of name of new party plaintiff in proceedings already had in an action — when not authorized.*
 See **BOARD OF SUPERVISORS v. MILLER**..... 71
- *Heirs and devisees — when may be joined as parties defendant, in action to recover payment of claim out of real estate of deceased debtor.*
 See **ROCKWELL v. GEERY**..... 606
- *Specific performance — who are necessary parties plaintiff in action for.*
 See **MCCOTTER v. LAWRENCE**..... 107
- PARTITION** — *Remainderman may bring action for — Tenancy in common, for purposes of partition, may exist between remainderman and owner of present estate.] The plaintiff's testator, in his lifetime a tenant in common with the defendant Thomas Sullivan, devised his share of the real property held in common, to his widow for life, with remainder to plaintiff in fee. Held, that*

PARTITION — *Continued.*

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the plaintiff could bring an action for partition during the life of the widow.

A remainderman may have a constructive possession which will be sufficient to constitute the unity of the right of possession required to exist in a tenancy in common. *SULLIVAN v. SULLIVAN* 198

PARTNERSHIP — *Agreement to pay individual debts of partner with partnership assets — when fraudulent as against creditors.*] 1. An agreement entered into between partners that a portion of the partnership assets shall be applied to the payment of the individual debts of one partner, the firm being at the time insolvent, is fraudulent as against creditors of the firm and may be repudiated by a receiver thereof. *LESLIE v. RUGG* 410

2. — *Assignment of one partner's interest to another — when works a dissolution of partnership.*] One member of a partnership entered into an agreement with A, to hold two undivided fifth parts of such partner's interest in the firm in trust for A, and to account to A for the profits, etc., arising therefrom, and that on the dissolution of the partnership such two-fifth interest should immediately vest in A, and should be assigned and set over by such partner to A. One member of the partnership, with the consent of his copartners, but without the consent of A, made a voluntary assignment of all his interest in the partnership to one of his copartners, and retired from the business. *Held*, that this worked a dissolution of the partnership under the terms of the agreement with A. *SISTARE v. CUSHING* 508

3. — *Limitation upon power of managing partner to create debts — when both partners liable though creditors had knowledge of the limitation.*] An agreement, in writing, was entered into between the defendants Partridge and Whitney, by which the former placed \$2,000 in the hands of the latter to be used in the business of buying and selling chairs and the materials therefor; Whitney having no authority to sign any note or obligation of indebtedness for Partridge, but to conduct the business for cash only; Partridge in no event to be liable for more than the \$2,000 advanced. Whitney was to have one-half of the profits and was to render quarterly statements showing the condition of the business. Whitney subsequently purchased of the plaintiffs in this action, who had notice of the conditions of the agreement, large amounts of goods upon credit. By the statements which were regularly furnished as required by the agreement, it appeared that debts had been created, in the course of the business, largely in excess of the \$2,000. *Held*, that Partridge by failing to object to the business being carried on upon credit, held Whitney out as authorized to transact the business in that way, and was liable for the debts so contracted. *MASON v. PARTRIDGE* 621

— *Authority to act in name of firm obtained by fraud — when fraud no defense.*

See *MERCHANTS' BANK OF CANADA v. HOLLAND* 420

PASSENGER — *Removal of, from car for non-payment of fare — evidence of attempt to avoid payment of fare on other occasions, inadmissible — right of, to resist conductor.*

See *ENGLISH v. DEL. AND HUD. CANAL CO.* 683

— *Ejectment of, from car for not possessing ticket — liability of company.*

See *TOWNSEND v. N. Y. CEN. AND HUD. R. R. CO.* 217

— *Ejectment of, from car reserved for ladies, by brakeman — when company liable.*

See *PECK v. N. Y. CEN. AND HUD. R. R. CO.* 236

PATENT — *Rights of assignees of — Invalidity of — effect of, on agreement by assignee to pay royalties — when assignor not estopped from setting up — Decree — when parties to, bound by.*] 1. In 1867 the plaintiff, to whom letters patent for an improvement in the manufacturing of stoves had been issued, assigned them to defendants, who agreed to pay her a certain sum for each stove manufactured thereunder, she agreeing to protect them in the exclusive enjoyment of the privileges thereby conferred. In 1869 she surrendered these letters, and obtained a reissue which was subsequently assigned to the defendants, subject to the agreement for compensation. Subsequently one Goodfellow, claiming to be the first

PATENT — *Continued.*

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inventor, procured letters to be issued to him, which he afterward assigned to the defendants, who sold the rights acquired under the assignment from the plaintiff, to one Burtis. Subsequently a suit was commenced by the defendants against the plaintiff and Burtis, in which a decree was entered deciding that the letters patent issued to the plaintiff were void, and of no effect. This action was brought to obtain the compensation agreed to be paid by the defendants to this plaintiff upon her assignment to them of the said letters. *Held* (1), that the decree in the suit brought in the United States court established conclusively, as between the parties to this action, that the letters patent were void, and that defendants were not estopped from setting up such invalidity; (2), that the letters patent being void, there was no consideration for the promise of the defendants to pay for stoves manufactured thereunder; (3), that the assignment by the defendants of their rights thereunder, did not estop them from setting up this failure of consideration as against the plaintiff. *HAWKS v. SWETT*..... 146
See MARSTON v. SWETT..... 153

2. — *What only conferred by letters patent.*] Letters patent for an invention confer nothing, except a right to bring actions, and thereby prevent persons from doing what they might otherwise lawfully do. *Id.*

3. — *Invalidity of letters patent — effect of, on agreement by assignees of, to pay royalties.*] An agreement was entered into between the plaintiff and defendants, the plaintiff and defendants being assignees of a patent for the manufacture of stoves, by which the plaintiff agreed that the defendants should have the exclusive right to manufacture thereunder, upon payment to him of a certain sum for each stove. Subsequently a suit was brought, in the United States court, by the defendants, against the plaintiff and others, in which it was decided that the letters patent were void. This action was brought to recover the sum agreed to be paid by the defendants. *Held* (1), that the joint interest of the parties, plaintiff and defendants, did not prevent the defendants from showing the invalidity of the letters patent; (2), that the decree in the former suit was conclusive as to the invalidity of the letters patent, and as to the right of the defendants to set up such invalidity as against the plaintiff; (3), that the patent, being void, there was no consideration for the agreement to pay royalties to the plaintiff. *MARSTON v. SWETT*, 153
See HAWKS v. SWETT..... 146

4. — *Licensee — when cannot set up invalidity of patent.*] The defendants agreed to pay to the plaintiff, the owner of a patent for the manufacture of rakes, ten dollars for each rake that should be made or sold, or disposed of by them, or by their authority or procurement; subsequently they sold to an incorporated company all their partnership effects, including all the rakes remaining unsold, and a number then in process of manufacture. *Held*, that the defendants were chargeable with the royalty upon each of the unfinished rakes so transferred. *MARSH v. DODGE*..... 278

5. — A licensee must notify the owner of the patent of his renunciation of the license, before he can repudiate his obligations under it. *Id.*

6. — *When party estopped from denying invalidity of.*] Upon the trial defendants objected to the admission in evidence of the patent, on the ground that it was not properly authenticated. *Held*, that proof of the patent was unnecessary, as the defendants were estopped from denying either its existence or validity. *Id.*

— *Fraud in sale of — Rescission of agreement — cannot be made after fruits of agreement have been enjoyed.*

See DOWS v. GRISWOLD..... 550

PAYMENT — *When delivery of check is not — creditor not bound to receive either check or money.*] The delivery of a check is not a payment, unless there be an agreement to that effect, or unless the drawer, in consequence of some laches on the part of the holder, has sustained loss or injury in respect thereof, and then only *pro tanto*. The creditor is not bound to accept a check, even if it be for the entire amount of his claim. He is not bound to receive money. He may, although it be sent to him, refuse to accept it and leave the debtor to his plea of tender when sued for the claim. He may do

PAYMENT — *Continued.*

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this even though, having received the money, he keeps it subject to the order of the debtor. The latter must withdraw the money and plead a tender, and thus save himself from the costs of the controversy.

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— <i>Receipt of note of third person — when not deemed payment.</i>	
See WHITAKER v. WHITAKER	810
— <i>Extension of time of payment of note — what amounts to — when indorser discharged by.</i>	
See BEARD v. ROOT	856
— <i>When payments to mortgagee after assignment of mortgage are valid as against assignee.</i>	
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PERFORMANCE — *Contract — when substantial performance of, sufficient.*

See GRAY v. GANNON	57
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PERJURY — *Committed on examination before fire marshal — Indictment — Variance.*

See HARRIS v. PEOPLE	1
— <i>In making affidavit annexed to claim against municipal corporation — indictment for — what must be averred in.</i>	
See ORTNER v. PEOPLE	323
— <i>Verification of answer containing allegation that defendant "says he denies," etc.</i>	
See PEOPLE v. CHRISTOPHER	805

PLEADINGS — *Amendment of — when allowed.*] 1. Where reasonable diligence has been shown, and the party for the first time discovers at the trial that the cause of action or defense has been misunderstood, and for that reason improperly alleged in his pleading, an amendment should be allowed, when applied for without unnecessary delay, by way of special motion.

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2. — *Variance between pleading and proof — when immaterial.*] Where, in an action upon contract, the complaint alleged that the plaintiff refused to enter into the contract unless one of the defendants *should indorse such contract* and become responsible for its performance, and upon the trial it appeared that the agreement was that the said defendant should *join in and sign* the same: *held*, that the variance was immaterial and should have been disregarded. *Id.*

— <i>Statute of frauds — when need not be pleaded.</i>	
See ALGER v. JOHNSON	412
— <i>When defects in pleadings cannot be urged in appellate court.</i>	
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— <i>In other actions — when admissible in evidence, to prove consideration of note given in settlement of such actions.</i>	
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— <i>Parol evidence as to contents of — general objection to admissibility of, insufficient.</i>	
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POSTHUMOUS CHILDREN — *Design of statute of descents in reference to.*

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POST-TESTAMENTARY CHILD — 2 R. S., 65, § 44.] 1. The rule as to the mode of determining the share of a post-testamentary child in the estate of his deceased parent discussed. SANFORD v. SANFORD

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2. — *Assessment of share of, among devisees and legatees* — 2 R. S., 456, §§ 64, 65.] In order to determine the assessment among the devisees and legatees of a share ascertained to belong to a post-testamentary child, each devisee and legatee is charged with such proportion thereof as the aggregate value of the testator's estate, on the day of his death, after the payment of debts, bears to the share of the post-testamentary child. *Id.*

POST-TESTAMENTARY CHILD — Continued.

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3. — *Advancements.*] Whether advancements are to be included when the share of the post-testamentary child is computed, but not when it is assessed, *quære. Id.*

POWERS — *Power of sale contained in will, not to be exercised during continuance of two lives in being — when valid — Power in trust — when created.*

See *BLANCHARD v. BLANCHARD.* 287

PRINCIPAL AND AGENT — *When principal bound by contracts of agent, though made in violation of instructions.*] 1. An agent who is accustomed to make contracts for his principal, with the principal's knowledge, may bind the principal by his contracts, although the instructions of the agent are not to contract without his principal's knowledge.

KELLY v. FALL BROOK COAL CO. 261

2. — *Guarantee made by agent — when principal not bound by.*] The defendants who were commission merchants in the city of New York, employed one Carr as their agent at Norwich, New York, to solicit, obtain, and ship to them produce to be sold on commission. The plaintiff delivered to Carr a quantity of butter to be shipped to defendants and sold on commission, upon the guarantee of said Carr that it should bring thirty to thirty-three cents per pound, less commission, and the defendants had no knowledge of the guarantee, and had never given Carr any specific authority to bind them by such a guarantee. No evidence was given of any similar act of Carr. The butter having been sold for less than the price guaranteed, this action was brought to recover the difference. *Held*, that Carr had no authority, either real or apparent, to make the contract, and that defendants were not liable thereon. *QUINN v. CARR.* 259

3. — *Credit given to agent on sale of property — discharge of principal by — question for jury.*] Where property is sold to an agent who, at the time, discloses the name of his principal, and states that the goods may be charged to him or to his principal, and the vendor, not knowing the principal, charges the goods to the agent, it is a question for the jury whether or not such exclusive credit is given to the agent as to discharge the principal.

MARYLAND COAL CO. v. EDWARDS. 482

4. — *Custom as to authority of agent — when party presumed to have dealt with reference to.*] This action was brought to recover damages for the breach of a contract for the purchase of coal, alleged to have been made with an agent of the defendant, the coal to be delivered at various times covering a period of four months. The defense was that the party making the contract was not the agent of the defendant. Upon the trial evidence was given to show that by a custom existing in reference to agencies for coal, the agent had not, unless specially authorized, the right to make a time contract such as the one in question. *Held*, that as the plaintiff would be presumed to have dealt with reference to the custom, it was incumbent upon him to have ascertained whether the agent had the special power to make the sale in question, and that as he had failed to do so, the defendant was not liable upon the contract, the agent not being in fact authorized to make it. *WHITE v. FULLER.* . 681

5. — *Liability of principal for acts of contractor.*] A person cannot, by contracting with others to do an act of which the natural consequence is unlawful damage to another, shield himself from responsibility therefor.

TOWN OF PIERREPONT v. LOVELASS. 696

— *Insurance agent — power of, to waive performance of condition in policy by parol, when policy provides for written waiver only.*

See *VAN ALLEN v. FARMERS' JOINT STOCK INS. CO.* 413

— *Insurance agent — power of, to waive condition of policy.*

See *SHEAR v. PHOENIX MUT. LIFE INS. CO.* 800

— *When railroad company liable for acts of agent acting within scope of employment, though against his orders.*

See *PECK v. N. Y. CEN. AND HUD. R. R. CO.* 236

PRINCIPAL AND SURETY — *Guarantor may prove fraud in principal as a defense to his liability.*] 1. The defendant guaranteed the payment of notes given to the plaintiff's testator by a person to whom the testator was

PRINCIPAL AND SURETY—*Continued.*

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accustomed to give advice, and over whom he had considerable influence. The defendant offered evidence to show that the notes were obtained by fraud, and that they were without consideration, which evidence was excluded. *Held*, that the evidence should have been received, and that proof that the notes had been obtained by fraud would have been a defense to the guarantor.

PUTNAM v. SCHUYLER..... 166

2. — *Invalidity of instrument or incapacity of principal, not a defense to surety.*] A party who assigns a note or bond for value, and guarantees its payment, cannot offer as a defense to its payment proof of its invalidity. The guarantor is also liable in cases in which the debt is justly owing, although from some defect or incapacity the principal is not liable on the instrument of which the payment is guaranteed. *Id.*

3. — *Surety on undertaking on appeal — when obligations of, not extinguished by his decease.*] An action may be maintained against the estate of a deceased surety who was a party to an undertaking given, in pursuance of section 335 of the Code, to stay proceedings upon a judgment during the pendency of an appeal. WOOD v. FISK..... 525

— *When a guarantee is personal, and assignee cannot maintain action thereon.*
See SMITH v. STARR..... 123

PROCESS — *When protects officer executing it.*] If the process be such as the court or officer issuing it has general jurisdiction to issue in proper cases, the officer executing it is protected by it. The defect must appear upon the face of the process, to render the officer executing it liable.

FIELD v. PARKER..... 342

See SMITH v. WARDEN..... 787

— *Safe in trust company's vault not within the protection against execution of process, afforded to dwelling-houses.*

See UNITED STATES v. GRAFF..... 634

PROMISE TO PAY — *When promise to pay for property received under contract void by statute of frauds, will be implied.*

See WOOD v. SHULTIS..... 309

PROMISSORY NOTE — *Illegality of consideration — when does not render note invalid in hands of bona fide holder.*] 1. Negotiable paper in the hands of an innocent holder, who has received it in good faith and in the ordinary course of business, for value and without notice of any defense to it, is not rendered invalid by reason of any illegality in its consideration, unless it is expressly declared void by statute. GRIMES v. HILLENBRAND..... 354

2. — *Extension of time of payment of — when discharges indorser.*] In this action brought against the defendant as indorser of a promissory note, the defense was interposed that the plaintiff, after the maturity of the note, had, by an agreement with the maker, extended the time of payment without defendant's consent. By the agreement, the maker of the note assigned to the plaintiff a bond and mortgage for \$600, having six months to run, upon which the plaintiff advanced \$100; the agreement providing that from the proceeds of the mortgage he was to retain the \$100 with interest, the amount of the note, and enough to make up the sum of \$525; that if, before the maturity of the mortgage, the maker of the note should repay the \$100 with interest, together with the amount of the note, then thirty dollars should be deducted from the amount to be retained from the proceeds of the mortgage. *Held*, that the agreement operated to extend the time of payment of the note until the maturity of the mortgage, and that the defendant was discharged thereby.

BEARD v. ROOT..... 356

3. — *Authority to indorse firm name — not known to holder — liability to bona fide holder when authority is exceeded.*] Defendant English, being the owner of a patent right, entered into an agreement with the defendant Perine, by which Perine was, at his own cost and expense, to sell the said right; the proceeds of such sale to be divided, share and share alike. The agreement further provided that all notes should be taken payable to the order of English & Perine, and authorized Perine to sign the name, if necessary, of English & Perine in transacting the business or any thing incident thereto,

PROMISSORY NOTE — *Continued.*

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and for the purpose of converting such notes into cash or other securities. Perine, without any consideration, indorsed a note of a third person with the name of English & Perine, intending thereby to defraud English. The plaintiff purchased the note in good faith for full value and before maturity. English & Perine had never held themselves out as partners, nor did plaintiff know of the agreement entered into between them at the time of purchasing the note. *Held*, that the agreement did not authorize Perine to indorse the note in English's name, and that the latter was not liable thereon.

HOTCHKISS v. ENGLISH..... 369

4. — *Making of, procured by fraud — when a defense as against bona fide holder — Negligence in signing, question for jury.*] This action was brought by a bona fide purchaser of a promissory note, which the maker claimed to have signed under the belief that it was a contract to act as agent for a patent cultivator. Upon the trial, evidence was given tending to prove that the note was signed by the defendant at his own house; that he and two of his sons, who were present, could read; that defendant attempted to read the paper, but did not understand it well, and that it was then read over by the person presenting the paper, who was an entire stranger to the defendant and his family, and signed by the defendant. *Held*, that it was proper to submit the question of defendant's negligence to the jury, and that a motion to direct a verdict in favor of the plaintiff was properly denied. FENTON v. ROBINSON, 258

5. — *Collateral security — improper disposition of — burden of proof.*] Where an indorser of a note is sued upon it, if the plaintiff has received any collateral security for its payment, the burden of proof is on the party sued to show that such collateral security has been improperly disposed of.

VOSE v. YULEE..... 628

6. — *Date of, only presumptive evidence of time of its execution.*] The date of an instrument in writing is only presumptive evidence of the time of its actual execution, and such presumption, whenever fraud or mistake is alleged, may be contradicted by parol evidence.

GERMANIA BANK v. DISTLER..... 633

7. — Such mistake may be shown as well by the indorsee as by the payee of a promissory note. *Id.*

— *In action upon, by executors, when indorsement to them need not be alleged.*

See LELAND v. MANNING..... 7

— *Usury — law of place where made, and not of place where negotiated, governs.*

See CLAYES v. HOOKER..... 231

— *When not usurious — lex loci contractus.*

See AGRICULTURAL NAT. BANK v. SHEFFIELD..... 421

— *Alteration of — ratification of, by indorser — when indorser liable.*

See NAT. STATE BANK v. RISING..... 793

— *When receipt of, not deemed payment.*

See WHITAKER v. WHITAKER..... 810

PUBLICATION — *New York city — 1857, chap. 446, § 7 — Failure to publish resolution authorizing contract — effect of, on contract.*

See MOORE v. MAYOR..... 545

— *Of ordinances and resolutions of board of aldermen of New York city, required by chap. 137, 1870, § 7 — what publication required — when must be made.*

See MATTER OF LEVY..... 501

— *Of summons — action against foreign corporation.*

See COFFIN v. CHICAGO AND N. PAC. CONS. CO..... 625

PUBLIC BUILDINGS — *Exemption of, from mechanics' liens.*

See VAN DENBURGH v. VILLAGE OF GREENBUSH..... 795

PUBLIC OFFICER — *A messenger to the president of the board of aldermen is not a public officer, within meaning of chap. 876, 1869, § 11.*

See SMITH v. MAYOR..... 644

RAILROAD COMPANY — *Ejection of passenger not possessing ticket, where ticket had previously been taken by conductor — liability of company.*] 1. The plaintiff, having purchased a ticket from Sing Sing to Rhinebeck, entered a train from New York at Sing Sing, which stopped at Poughkeepsie, where passengers going farther north were accustomed to take the next train. Just before coming to Poughkeepsie, the conductor of the train took up plaintiff's ticket. Plaintiff having entered the next train going north at Poughkeepsie, the conductor of that train, shortly after leaving that place, demanded his ticket, and, upon his refusal to pay the fare, ejected him from the train, although informed by the plaintiff and other passengers that the other conductor had taken his ticket. In an action brought by the plaintiff to recover damages for such expulsion, *held*, that he was entitled to recover.

TOWNSEND v. N. Y. CEN. AND HUD. R. R. Co. 217

2. — *When liable for acts of agent in ejecting passenger — acts within scope of employment.*] Where a brakeman who had been directed to notify passengers attempting to enter a certain car that was reserved for ladies, and to show them to some other car, removed from said car a person who had entered it, after being forbidden to do so, and in so doing used unnecessary violence; *held*, that, even if the brakeman exceeded his orders in ejecting the plaintiff, yet, as between the latter and the company, it was enough that the act was done in the prosecution of the company's business, and that it was liable therefor. PECK v. N. Y. CEN. AND HUD. R. R. Co. 236

3. — *When proceedings to take land under general railroad act may be discontinued — costs on such proceedings.*] Under the provisions of the general railroad act (chap. 140 of 1850, and chap. 237 of 1869), relative to the taking of land for the railroad company, there is no obligation imposed on the company to take land until the confirmation of the report of the commissioners appointed to assess the damages. Up to this point in the proceedings, the court has power on the application of the company to discontinue the proceedings.

The act, chapter 270 of 1854, authorizes the awarding of costs in proceedings under the general railroad act.

MATTER OF SYRACUSE, BINGHAMTON AND N. Y. R. R. Co. 311

4. — *Petition in proceedings to acquire lands, after completion of road — need not state facts required in original petition.*] Where a railroad company, after having located and completed its road, institutes proceedings, under chapter 237, Laws of 1869, to acquire title to other lands necessary for the convenient transaction of its business, the petition need not state all the facts which are required in the original petition; nor is it necessary to make and file the maps which are required when the company first applied to acquire lands for its road. MATTER OF N. Y. CEN. AND HUD. R. R. Co. 381

5. — 1850, chap. 140 — *Subscription for stock of — check taken as cash — agent to procure subscriptions — authority of.*] The defendant, having been applied to by an agent employed to procure subscriptions to the stock of the plaintiff, gave his check for the ten per cent required by the act of 1850 to be paid in cash, upon the express agreement that he should never be called upon to pay the same. In an action brought by the company upon the check, *held* (1), that the taking of the check for the ten per cent required to be paid in cash, was not such a violation of the act as to render it void; (2), that the agent had no authority to bind the company by his agreement in regard to the liability of the defendant upon the check.

SYRACUSE, PHOENIX AND OSWEGO R. R. Co. v. GERE. 392

6. — *Proceedings to acquire lands — petition in — burden of proof.*] Where an application is made to take real estate under the general railroad act (chap. 140, Laws 1850) the burden of proving, by legal evidence, that the facts alleged in the petition are not true, is, by section 15 of the said act, cast upon the owner of the land, and an affidavit or answer is not sufficient for that purpose. MATTER OF N. Y. BRIDGE Co. 635

7. — *Section 26, chap. 140, 1850, not compulsory on company.*] Section 26 of said act, providing that when the title is vested in any trustee not authorized to sell, or in any infant, idiot or person of unsound mind, the Supreme Court shall have authority to direct the sale of the land, is for the benefit of

RAILROAD COMPANY — *Continued.*

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the trustee and infant or idiot owner, and is not compulsory upon the railroad company. *Id.*

— *Starting train by sudden jerk, without warning to passengers — when liable for injuries occasioned by.*

See MILLIMAN v. N. Y. CEN. AND HUD. R. R. Co. 409

— *Engine stopped at railroad crossing — sudden escape of steam from, frightening horse — liability of company.*

See BORST v. LAKE SHORE AND MICH. SO. R. Co. 346

— *When may be restrained by injunction from diverting property covered by mortgage, at suit of bondholder.*

See WEETJEN v. ST. PAUL AND PACIFIC R. R. Co. 529

— *Contributory negligence — care required of employes working upon track.*

See OMINGER v. N. Y. CEN. AND HUD. R. R. Co. 159

— *Negligence — contributory negligence in leaving car before arriving at station.*

See TABER v. DEL., LACK. AND WEST. R. R. Co. 765

— *Negligence — when party guilty of negligence in walking upon railroad.*

See ELWOOD v. N. Y. CEN. AND HUD. R. R. Co. 808

— *Negligence of, in allowing cars to run without any one in charge of them.*

See SUTTON v. N. Y. CEN. AND HUD. R. R. Co. 760

— *Proceedings to acquire lands — burden of proof that allegations of petition are untrue.*

See MATTER OF N. Y. BRIDGE Co. 685

— *Effect of conveyance to, containing habendum clause "to the uses and purposes of said railroad."*

See LUDLOW v. HUDSON RIVER R. R. Co. 239

RATIFICATION — *When a contract, void for failure to publish resolution authorizing it, cannot be ratified by officers of city.*

See MOORE v. MAYOR 545

— *Of lease of armories in New York city, made without authority — occupancy by militia and payment of rent cannot be treated as ratification.*

See FORD v. MAYOR 587

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REAL PROPERTY — *Lateral support — when owner estopped from asserting right to.*

See LUDLOW v. HUDSON RIVER R. R. Co. 239

— *When regarded as personality where testator has directed it to be sold and proceeds divided.*

See SHUMWAY v. HARMON 411

— *Contract of sale — when title of vendee in, is superior to that of a grantee with notice.*

See TOWNSEND v. BISSELL 297

— *Contract for sale of — when requiring affidavit of solvency of grantor authorizes rescission of.*

See WORMSER v. GARVEY 476

— *Assignees of contract for sale of — rights and interests of, as between each other.*

See PLYMPTON v. BOEHME 396

— *When equitable title remains in bankrupt, after conveyance to assignee.*

See COLIE v. JAMISON 284

— *Proceedings to acquire, by R. R. Co. — petition in — burden of proof.*

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RECEIPT — *Of payment in full of all claims and demands by contractor — when prevents recovery of damages from employer for laches of co-contractor.*

See COULTER v. BOARD OF EDUCATION 569

— *Of Express Co. — when expresses contract between parties.*

See HUNTINGTON v. DINSMORE 66

RECEIVER — *Action by judgment creditor of corporation for appointment of — judgment fraudulently obtained — presumption arising from failure to take direct proceedings to set aside.*] 1. The plaintiff, a judgment creditor of defendant, applied for the appointment of a receiver of the defendant, a corporation, which, as a defense to the motion, alleged that the judgment was obtained by the collusion and fraud of the president of the corporation; upon the hearing, time was given to make a motion to open the judgment on that ground, of which opportunity defendant did not avail itself. *Held*, that the court was authorized to infer, from its failure so to do, that the defense was without merit. *LODER v. N. Y., UTICA AND OGDENSBURGH R. R. Co.* . . . 22

2. — *Payment by, of fictitious, unfounded claims — remedy of creditor.*] When the evidence establishes the fact that claims, allowed and paid out of funds in the hands of a receiver by an order of the court, are fictitious and unfounded, the proper proceeding by a creditor of the fund is to apply to be made a party to the suit in which the order was made, and to have such order vacated; for in such proceeding the court has a wider discretion and greater power for relief than in an independent action depending for its success upon satisfactory proof of fraud. *SCHENCK v. INGRAHAM.* . . . 67

3. — *Of railroad company — not personally liable for negligence of employees — liable for his own misconduct.*] A receiver is personally liable to persons sustaining loss or injury by or through his own neglect or misconduct; but for the neglect or misconduct of those employed by him in the performance of the duties of his office, he is only liable in an action brought against him as receiver, and any judgment recovered therein must be made payable out of funds in his hands as such receiver. *CAMP v. BARNEY.* . . . 373

4. — *Judgment may be modified on appeal so as to be against defendant as receiver only.*] This action was brought against the defendant, who was operating and managing the Buffalo, Corry and Pittsburgh railroad, as a receiver duly appointed by the United States District Court, to recover damages for personal injuries sustained by the plaintiff while traveling as a passenger on the railroad. Upon appeal from a judgment recovered by the plaintiff upon the trial of the said action, *held*, that the record and proceedings should be modified so as to make the judgment against the defendant as receiver only, and not against him personally, and that, as so modified, it should be affirmed. *Id.*

5. — *Remedy of receiver where it is sought to charge him personally.*] If, in such case, a receiver desires the protection of the court by which he was appointed, he must apply thereto for an injunction, and in case he fail so to do, the action at law may proceed as though permission to bring the same had been received from such court. *Id.*

— *When, having no notice of claim before paying dividend, not required to pay creditor.*

See SMITH v. MANHATTAN INS. Co. . . . 127

— *When chargeable personally with costs in action upon bond of indemnity.*

See CHAPIN v. THOMPSON. . . . 779

RECORDING — *Mortgage — equities, between mortgagees — how far subsequent purchaser bound by.*] Two mortgages bearing even date were given respectively to A and B, with the understanding that they were to be equal liens upon the real estate described in them. B's mortgage was first recorded. Subsequently, but after A's mortgage was recorded, B assigned his mortgage to C, and C thereafter assigned it to D; both C and D being ignorant of the understanding that the mortgages were to be equal liens upon the premises. *Held*, that D, being a purchaser in good faith and for a valuable consideration, might avail himself of the earlier recording of his mortgage, and that it was a prior lien to that of A. *GREENE v. DEAL.* . . . 703

REFEREE — *Refusal of, to order bill of particulars, not reviewable.*

See MATTER OF WELLER v. WELLER. . . . 195

— *Fees of, on sale in foreclosure — 1869, chap. 569; 1874, chap. 192.*

See PHILIPS v. WALKER. . . . 645

REFERENCE — *Inability of party to pay referee's fees not valid objection.*] 1. It is no objection to an order referring an action, that the plaintiff is insolvent and will be unable to pay the referee's fees, and that the action is brought in bad faith. *PLACE v. CHESEBROUGH*..... 577

2. — *Long account.*] A reference may be ordered although one of the several issues in the case may not require the examination of a long account. *Id.*

3. — *Power of court to order.*] The power of the court to refer common-law actions involving the examination of a long account, existed at the time of the adoption of the Constitutions of 1777 and 1822. *Id.*

4. — No exception lies to the refusal of a referee to find the particulars which go to make up his general conclusions of fact. *AVERY v. FOLEY*.... 415

5. — It is erroneous for a referee to find the evidence of facts instead of the facts themselves. *Id.*

6. — *Code, § 270 — when court may order reference under.*] Under section 270 of the Code, the court may, by consent of the parties, order a reference to determine any issue or question of fact, instead of directing the same to be tried by a jury. *THURBER v. CHAMBERS*..... 721

7. — *Referee's report—effect of.*] When in such cases the referee is directed to report his proofs with his finding, his report has the same effect as the verdict of a jury would have, and the judge is at liberty to form his own conclusions of fact and of law upon the evidence, using the report as merely advisory. *Id.*

— *Power of court to order, on application to vacate assessment, made under chap. 312, 1874—Distinction between power of court to order reference in actions and in special proceedings.*

See *MATTER OF BOHM*..... 558

— *As to surplus moneys — object of.*

See *UNION DIME SAVINGS INSTITUTION v. OSLEY*..... 657

— *When trial will require examination of long account, though action be not on an account—Laches in moving for.*

See *MAYOR v. GENET*..... 658

RELEASE — *Obtained by fraud — avoided by proof of fraud.*

See *DAMBMAN v. SCHULTING*..... 50

RELIGIOUS CORPORATION — *Organized under act of 1813 — status of — right to vote.*] 1. A corporation formed under section 2 of "An act to provide for the incorporation of religious societies," passed April 5, 1813, is not an ecclesiastical corporation in the meaning of the English law; but the majority of the corporators have the right to control the corporate body in accordance with their beliefs, and they are free from any ecclesiastical restriction. It is a connection with the particular society, not with the denomination at large, that gives the right to vote. *WATKINS v. WILCOX*..... 220

2. — *When one corporator may not bring action to set aside conveyance made by it.*] When property of a religious corporation is sold for its full value, and the only objection to the sale lies in alleged irregularities in the proceedings before the County Court, an action by a corporator to declare the conveyance made by the corporation void, will not be sustained. *Id.*

3. — In an action brought to set aside an order changing the name of a religious corporation, the corporation must be a party. *Id.*

RELIGIOUS SOCIETY — *What is a religious society within meaning of chap. 282, 1852, limiting exemptions from taxation — When can maintain action to have taxes declared void.*

See *HEBREW FREE SCHOOL ASSOCIATION v. MAYOR*..... 446

REMEDIES — *Election of one of two inconsistent remedies — effect of.*

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The mere filing of the papers on an application for the removal of a cause to the United States court, does not have the effect of removing the action. The court must act upon them either by order or by accepting the sureties offered. *VOSE v. YULEE*..... 628

RENSSELAER COUNTY — *Mechanics' lien — chap. 778, 1866, was not repealed by chap. 558, 1869, as amended by chap. 194, 1870 — Exemption of public buildings.**See* VAN DENBURGH *v.* VILLAGE OF GREENBUSH..... 795**REPEAL** — *Repeal of repealing act — effect of.* When a statute repealing a preceding statute is itself repealed, the original act is revived and continues in force from that time. *SCHWAB v. PEOPLE*..... 590

— *Chap. 778, 1866, was not repealed by chap. 558, 1869, as amended by chap. 194, 1870.*

See VAN DENBURGH *v.* VILLAGE OF GREENBUSH..... 775— *Chap. 563, 1868, creating office of fire marshal, not repealed.**See* HARRIS *v.* PEOPLE..... 1

REPLY — *When only required.* Under the Code, no reply to an answer is necessary unless it sets up a counter-claim, but the plaintiff is permitted to prove any matter in denial or avoidance of the answer when it sets up new matter, as the case may require. *DAMBMAN v. SCHULTZ*..... 50

REPORT — *Of trustee of mining corporation — failure to file — when action cannot be maintained for.**See* BRONSON *v.* DIMOCK..... 614

RESCISSION OF CONTRACT — *Restoration of what has been received under contract must be made.* 1. This action was brought by the plaintiff to restrain the defendant from enforcing a chattel mortgage which she had given to him to secure \$350, the purchase-price of a lease, liquor store and the contents thereof, sold by the defendant to the plaintiff, and of which the latter had taken possession. The plaintiff claimed to rescind the contract and to have the mortgage declared void by reason of fraudulent representations of the defendant in respect to the business of the store and the rent of the premises. *Held*, that the plaintiff could not maintain the action, as she had failed to restore to the defendant the property received from him under the contract.

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2 — *Obligations assumed under contract, cannot be disaffirmed after its fruits have been enjoyed.* A party alleging fraud by which he has been induced to execute obligations for the payment of money, must act promptly on discovering the fraud, if he intends to rescind the contract which he was induced to enter into by it. He cannot enjoy the fruits of the transaction and then disaffirm it as to his obligations.

The rule is otherwise when the party seeking to rescind has received nothing of value from the other party. *DOWS v. GRISWOLD*..... 550

— *Party disaffirming must restore or offer to restore what he has received.**See* VAN LIEW *v.* JOHNSON..... 415

— *When requiring affidavit of solvency of grantor, authorizes rescission of contract for sale of land.*

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SALE — *Delivery of property to carrier — when title vests in purchaser.* The plaintiff entered into an agreement with Park & Co. of N. Y. which he was to fill certain casks furnished by them, with cider loaded upon the cars at Lockport, each car to contain fifty casks, to therefor, and transmit that, with a draft for the price, to the defendant. After certain of the casks had been delivered to the defendant, was waiting for enough to fill a car, eleven of them were found to be *Held*, that the title to the cider did not vest in the purchasers until loaded and a receipt taken; and that plaintiff was entitled to maintain the action. *GILBERT v. N. Y. CEN. AND HUD. R. R. Co.*.....

2. — *When delivery conditional — when condition waived.* When delivery is conditional; but such condition may be waived, deemed to be so after a considerable period of time has passed, steps being taken by him to assert his right to repossess the goods. *WRIGHT v. PIERCE.*.....

3. — *Goods sold on credit — if sale induced by fraud action may be maintained — In such case fraud is a material issue.* When goods are sold on credit, if the sale be induced by fraudulent misrepresentation of value may be commenced before the termination of the period of such action the question of fraud is material to the issue, and the goods recovered therein will not be deemed to have been recovered in violation of contract. *REID v. MARTIN.*.....

— *Credit given to agent instead of principal.*

See *MARYLAND COAL CO. v. EDWARDS*

— *Statute of frauds — acceptance — mere words of contract constitute.*

See *HAM v. VAN ORDEN.*

— *Statute of frauds — delivery — mere words are not sufficient.*

See *MOORE v. BIXBY.*

— *When instrument constitutes a sale, and not a lease, of down.*

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SARATOGA SPRINGS — Chap. 623, 1870, laying out *Unionville* constitutional.

See *PEOPLE EX REL. KILMER v. McDONALD.*.....

SCHOOL TAXES — *Collector — bond of — no power to collect tax given — statute as to, mandatory.* 1. A collector of school moneys is not to execute a warrant for the collection of a tax until the bond required by section 83, chapter 555 of 1864, is executed.

Until the trustees limit the time within which the bond must be determined its amount, the collector will not be in default.

WOODHULL v. BOHENBLOST

2. — *Collector — trustees not entitled to receive moneys from.* Trustees are not entitled to receive the money from the collector, who is bound to pay it out on their order, and he is not in default until such money is drawn and presented to him. *Id.*

3. — *Collector — when action lies against, on his bond.* An action lies against the collector, in favor of the trustee, on his bond: 1st. When he neglects to execute his warrant. 2d. If, by his laches, any tax is lost to the trustee or he has neglected to pay over any balance in his hands to his superior.

SECRETARY OF THE NAVY — *Authorized to appoint firm to act as his agent.* The secretary of the navy is authorized under an act of congress (14 U. S. Stat. at Large, 64, § 1), to appoint a firm in I. as his agent in paying drafts drawn by naval officers, and in receiving, necessary, exact and receive all such securities as he can obtain from the department against loss by reason of the apprehended insolvency of the firm. *WEETJEN v. ST. PAUL AND PACIFIC R. R. Co.*.....

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SET-OFF — <i>Action to set off debt against judgment—when cannot be maintained.</i> Where a party against whom a judgment has been recovered commences an action against his judgment creditor for the purpose of recovering a claim existing in his favor against such judgment creditor, and in such action issues an attachment and by virtue thereof attaches such judgment, he is precluded, while the suit in which such attachment issued is pending, from maintaining an action in equity to apply the debt sued on in such action as a set-off against the judgment recovered against him. BUTLER v. WEHLE.....	54
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SIDEWALKS — <i>Liability of adjacent owners for injuries resulting from interference with.</i> 1. A person who interferes in any way with a sidewalk in a city, and leaves it in a dangerous condition, is liable for injuries caused thereby, whether he knew it to be dangerous or not, and irrespective of any permission from the public authorities to do the work from which the injury arises. WHALEN v. GLOUCESTER.....	24
2. — A cover to a hole in a sidewalk becomes a part of the highway, and must be as secure as the walk itself. <i>Id.</i>	
— <i>Liability of city for injuries caused by steep grade of.</i>	
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SLANDER — <i>Privileged communications.</i> 1. Statements made by a resident of a school district, having a daughter whom he wishes to send to school, to the trustees of the district as to the bad character of a woman proposed to be employed as a teacher, are privileged, and no recovery can be had therefor without proof of express malice.	
To authorize a recovery in cases where the communications are alleged to be privileged, it is sufficient to prove that the defendant knew the charge to be false. HARWOOD v. KECH.....	382
2. — <i>Malice—when implied—when denial of, immaterial.</i> Malice is implied from the utterance of slanderous charges not justified or privileged, and a denial of malicious intent is of no avail. <i>Id.</i>	
SPECIFIC PERFORMANCE — <i>Parties—who are necessary parties plaintiff in action for.</i> 1. All who are interested in a contract for the conveyance of land, must join with the plaintiff in an action brought for its enforcement, or a valid excuse for their not joining with the plaintiff must be shown.	
McCOTTER v. LAWRENCE.....	107
2. — <i>Parties—defect of—how not remedied.</i> Such defect is not remedied by a judgment directing a conveyance to be made to the plaintiff and her co-owners and their assigns, without naming them, as such co-owners have a right to elect to accept a specific performance, or to sue for damages for a breach of contract. Such an action is within section 97 of the Code. <i>Id.</i>	

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3. — *Statute of limitations — when begins to run — when may not be interposed.*] In an action in equity by a vendee in an executory contract for the sale of lands, no proof of a demand or tender of performance, on his part, before instituting suit for a specific performance is necessary, but an offer to perform, made in the complaint, and ability to perform at the time of the decree, are sufficient; and the statute of limitations begins to run without any formal denial by the vendor of the right of the vendee.

Parol admissions and acts *in pais* are no longer sufficient to prevent the operation of the statute of limitations.

It is only when the vendee has become entitled to a specific performance of the contract by the vendor, by reason of a full performance thereof by the vendee, that the vendor will not be allowed to disturb his possession, or to interpose the statute of limitations as an obstacle to his right to have his equitable title perfected by a conveyance of the legal estate.

A court of equity has no more power to disregard the statute of limitations than a court of law. *Id.*

4. — *Delay, caused by defendant, no defense in action for.*] Where land contracted to be sold was incumbered by a judgment against the vendor, an appeal having been taken, however, in the action in which the judgment was recovered, and on the application of the vendee's agent for the fulfillment of the contract, the vendor said the vendee would have to wait till the suit was settled, which statement was communicated to the vendee, who said, "very good," and proceeded to have his contract acknowledged and recorded: *held*, in an action brought by the vendee for specific performance, after the judgment had been reversed, that the vendor was bound to assume that his answer would be communicated to the vendee, and could not set up the vendee's delay which he had himself caused.

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— *Of contract for sale of land — when requiring affidavit of solvency of grantor authorizes rescission of.*

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STATUTE OF DESCENTS — *Posthumous children — design of statute in reference to.*

See ROCKWELL v. GEERY..... 606

STATUTE OF FRAUDS — *Promise to pay debt of another.*] 1. A being indebted to B for sawing lumber at A's mill, conveyed his property to C, who hired B to continue the running of the mill, saying that he would pay him the same that A had paid him, and saying further, that he had made arrangements with A to pay A's debt to the plaintiff, and that he would pay him the back pay that was coming to him. *Held*, that the agreement to pay A's debt was void under the statute of frauds. *BEKNAP v. BENDER*..... 414

2. — *Contract for manufacture of tent — when not within.*] A contract for the manufacture of an article out of material to be supplied and furnished by the manufacturer, is not within the statute of frauds.

HIGGINS v. MURRAY..... 565

3. — *Property received under contract void by — when promise to pay for, implied.*] Where a party receives property under a contract, void by the statute of frauds, and, for that reason, subsequently refuses to fulfill the contract on his part, the law implies a promise to pay the value of the property so received. *WOOD v. SHULTIS*..... 809

4. — *When need not be pleaded.*] It is only when a complaint sets forth a contract, and the answer admits that allegation, that the defendant must plead the statute of frauds. *ALGER v. JOHNSON*..... 412

5. — *Acceptance — what constitutes.*] The mere words of a contract for sale of chattels do not constitute an acceptance within the provisions of the statute of frauds. The vendee must act so as to indicate that he receives and accepts the goods. *HAM v. VAN ORDEN*..... 709

6. — *Delivery.*] Mere words are not sufficient to constitute a delivery of personal property. *MOORE v. BIXBY*..... 802

STATUTE OF FRAUDS — Continued.

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7. — *Contract for sale of logs.*] This action was brought to recover the price of 206 logs, sold to defendant. The defense was that these logs were delivered under a contract, by which the plaintiff's assignor agreed to deliver to the defendant all the market pine saw logs that could be cut from the "Perry" lot, in Wilton, the logs to be delivered at defendant's saw-mill, at two dollars per log, in the years 1873 and 1874, and to be measured and counted at said mill, which logs the defendant agreed to accept and pay for; that the plaintiff's assignor cut a large number of logs from the lot, in addition to the 206, which he refused to deliver to the defendant, by means of which the defendant had sustained damage. *Held*, that this was not a contract for the sale of standing timber, and that it was not essential to its validity that it should be in writing, and therefore such defense could be established under it. *BOYCE v. WASHBURN*..... 793

STATUTE OF LIMITATIONS — Defense of — when must be set up by obligee in bond of indemnity against claims, etc.]

1. More than six years after the cause thereof arose, an action was brought against the plaintiff herein, to recover the rent of certain premises which had been occupied by him as receiver. Against such an action the defendant had, by a bond of indemnity, covenanted to save and keep the plaintiff harmless. The plaintiff, although requested by the defendant to do so, refused to interpose to such action the defense of the statute of limitations, or allow the defendant to do so, but suffered judgment to be taken against him for the amount claimed. In this action, brought upon such bond, to recover from the defendant the amount of such judgment, *held*, that the defense of the statute of limitations stood upon the same footing with other legal defenses, and was to be treated with the same respect, and given the same favor and consideration, as common-law defenses; that it was the plaintiff's duty to have set up such defense to the action brought against him, or to have suffered the defendant to do so, and that, having refused to do either, he was not entitled to recover in this action; that the plaintiff was properly charged personally with the costs therein. *CHAPIN v. THOMPSON*..... 779

2. — *Code, § 110 — parol ratification of contract of infant.*] This action was commenced in November, 1873, to recover for goods sold, in June, 1867, to the defendant, who was then an infant nineteen years of age. The goods were not necessities. In September, 1871, the defendant, *by parol*, acknowledged the justness of the account against him for the goods, and promised to pay it. *Held*, that section 110 of the Code was inapplicable to such a case, and that such parol ratification and promise were valid; that plaintiff's claim not being capable of enforcement until ratified by defendant after reaching his majority, plaintiff's cause of action did not arise until then, and therefore was not barred by the statute of limitations. *HALSEY v. REID*..... 777

3. — *Of actions against sheriffs — when inapplicable — 1871, chap. 733, § 2.*] The statute of limitations (one year) for acts done by a sheriff in his official capacity, and in virtue of his office, or by the omission of an official duty, is not applicable to a cause of action against the sheriff for procuring payment, by means of a sworn bill and false vouchers, for board of fictitious persons who were never confined in the county jail.

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— *Action for specific performance — when within § 97 of Code — when statute begins to run — when statute may not be interposed.*

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STATUTES — Construction.] A statute should receive a strict construction, which imposes a liability for injuries indirectly, if at all, occasioned by an act which is not forbidden by law. *HAYES v. PHELAN*..... 733

— 2 R. S., 64, § 39 — *Construction of words, "deemed to be revoked."*

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- 1853, chap. 153 — *Joint-stock companies — individual liability of members of — remedy of creditor when one or more members die.*
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- 1854, chap. 270, *authorizes awarding of costs in proceedings of R. R. Co. to acquire lands.*
See MATTER OF SYRACUSE, B. AND N. Y. R. R. Co..... 311
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- 1866, chap. 378, *having been repealed by chap. 175, 1870, § 15, chap. 628, 1857 (excise law) is applicable to city of New York.*
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— *When estopped from denying legality of incorporation*—when liable for subscription for stock—when fraud of directors no defense to action for amount subscribed.

See **DORRIS v. FRENCH**..... 292

STREETS—*Power of legislature to locate and open.*] 1. The legislature has power to locate and open a highway without the instrumentality of highway commissioners, and to provide for the apportionment and collection of the expenses thereof.

Chapter 623 of 1870, as amended by chapter 293 of 1872, laying out Union avenue in the village of Saratoga Springs, and providing for the opening and working of the same, and for defraying the costs thereof, is constitutional and valid.

By the said act, the costs and expenses of the improvement are to be assessed against the individual owners, and not against their land.

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2. — *Dedication and acceptance for purposes of—what constitutes.*] In 1849 the petitioner conveyed certain lots, on the north side of Ninety-first street, as laid down on a map of the city of New York, reserving a right of way through said street, which had never been opened by the city, for the owners of other lots; the street was subsequently used by the general public as a highway for the passage of vehicles of various kinds, and for foot passengers; gas and water pipes were laid in it, and for several years it had been lighted with gas. *Held*, that these acts constituted a dedication of the land to the use of the public as a street, and an acceptance thereof by the public.

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3. — *Rights of corporation in land dedicated to uses of street.*] When a street is thus created, it necessarily becomes subject to the acknowledged power of the authorities to regulate, grade and improve it, and this right is necessarily accompanied by the further right to impose upon the adjoining land the expenses of such acts as may be done in the proper exercise of any of these powers. *Id.*

— *Appeal from order of confirmation in proceedings for opening of—may be taken to General Term—does not lie to Court of Appeals—Upon whom notice of appeal served.*

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SUBMISSION UNDER CODE—*What judgment may be given.*] Upon submission of a controversy under section 372 of the Code, the court is bound to give such judgment as the facts require, whether it be legal or equitable.

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2. — <i>Attachment — omission to serve summons within thirty days.</i>] The omission to serve the summons within thirty days of the allowance of an attachment, entitles the defendant to avoid all proceedings after the issuing thereof, but does not render such proceedings void as against third persons. <i>Id.</i>	
3. — <i>Notice in — form of, in action for rent, when rent is payable in wheat.</i>] An action to recover rent upon a lease, by the terms of which the rent is to be paid in wheat, is not an action arising on contract for the recovery of money only, and the summons should contain the notice required by subdivision 2 of section 129 of the Code. BLAIDSELL v. WHITEFORD....	264
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2. — 1852, chap. 282, limiting exemptions — construction of words "religious society" and "exclusively the property" in.] Chapter 282 of the Laws of 1852, limiting the exemptions from taxation created by the Revised Statutes (1 R. S., 388, § 4, sub. 3) was not intended to require the property to belong exclusively to a religious society, organized as an incorporated church, but to a society whose organization and objects should be of a benevolent, charitable or missionary character, falling within the general sense of the term religious, as contradistinguished from private and secular institutions.	
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4. — *Religious society* — when can maintain action to have taxes declared void.] An action can be maintained by such a society to have taxes assessed against it declared void, where the proceedings are regular on their face, and extrinsic evidence is requisite to show the invalidity of the tax. *Id.*

5. — Where a tax is imposed upon property exempt by law, the omission to appear before the commissioner of taxes does not give validity to the assessment. *Id.*

— *Collector of school taxes* — no power to collect taxes until bond is given — when action lies on his bond in favor of trustees.

See *WOODHULL v. BOHENBLOST*..... 399

TAX SALE — *Effect of, on prior mortgage.*] Where land, upon which there is a recorded mortgage, is sold for unpaid taxes, and a deed thereof is subsequently given by the comptroller, the purchaser acquires the legal title to the land, subject only to the right of the mortgagee to redeem as provided by sections 76 and 77 of chapter 427 of 1855. *BECKER v. HOWARD*..... 359

TENANCY IN COMMON — *For purposes of partition, may exist between remainderman and owner of present estate.*

See *SULLIVAN v. SULLIVAN*..... 198

TITLE — *When title of vendee in contract of sale, is superior to that of a grantee with notice.*

See *TOWNSEND v. BISSELL*..... 297

— *Of property delivered to carrier for purchaser — when vests in consignee.*

See *GILBERT v. N. Y. CEN. AND HUD. R. R. Co.*... 378

— *To land — when not brought in question in Justice's Court.*

See *CLOW v. VAN LOAN*..... 184

TORT — *What actions for, survive.*

See *BOND v. SMITH*..... 48

— *When not waived by receipt of part of claim for conversion.*

See *LAMBERTSON v. VAN BOSKERCK*..... 628

TOWN BONDS — *Cannot be issued in aid of private corporation.*

See *WEISMER v. VILLAGE OF DOUGLAS*..... 201

TRESPASS — *Cutting and removing standing timber — measure of damages in action for.*] In an action for cutting and removing standing timber, the measure of damages is the value of the timber at the place where it stood when the trespass was committed, unless the action is brought and a recovery had under the statute (2 R. S., 338, § 1), when the damages may be trebled.

STANTON v. PRITCHARD..... 266

TRIAL — *Right to open and close case.*] Where, in an action upon a life insurance policy, a copy of which is set forth in the complaint, the answer "admits each and every allegation in the complaint contained, except that they deny that the paper marked 'A,' annexed to the complaint, is a full and complete copy of the policy issued by them." *Held*, that the answer in substance and effect denied the making of the contract set up in the complaint, and that plaintiff was entitled to open and close the case.

HUNTER v. AM. POPULAR LIFE INS. Co..... 794

TROVER — *Damages by converting cow and allowing her to become dry.*

See *SMITH v. WILCOX*..... 411

TRUST — <i>When valid power in trust is created by will.</i>	PAGE.
<i>See</i> BLANCHARD v. BLANCHARD	287
— <i>Trustee may purchase from cestui que trust his interest in trust estate.</i>	
<i>See</i> GRAVES v. WATERMAN	687

TRUSTEE— “Reasonable compensation” of—how determined—statutory commission inapplicable.] 1. When the creator of a trust expressly provides that the trustee shall have a reasonable compensation for his services, the compensation must be determined with reference to the special circumstances of the estate and the services performed.

The statute regulating the commissions of executors, etc., does not apply to such a case. *MATTER OF SCHELL* 65

2. — *May purchase from cestui que trust.*] There is no rule of law which prevents a trustee from purchasing from a *cestui que trust* his interest in the trust estate. But the courts will examine all such transactions with care, in order to see that no undue advantage has been taken of the *cestui que trust*.

GRAVES v. WATERMAN 687

— *Of mining corporation—failure of, to file annual report—when action cannot be maintained against, by assignee of demand.*

See BRONSON v. DIMOCK 614

— *When court has power to appoint, for protection of tenants for life and remaindermen.*

See LIVINGSTON v. MURRAY 619

— *When executor charged as trustee of personal estate.*

See CHIPMAN v. MONTGOMERY 789

TURNPIKE COMPANY— *Conveyance of corporate property and franchises by—1855, chap. 347—grantee entitled to bring action for penalties for running toll gate.*] In pursuance of chapter 347, Laws of 1855, the eastern branch of the Schoharie Turnpike Company conveyed all its corporate property and franchises to one Nichols, who entered into possession of the road and collected tolls until 1867, when he conveyed all his right, title and interest therein to the plaintiff. *Held* (1), that the act of 1855 was constitutional and valid; (2), that the plaintiff was entitled to maintain an action in his own name, against the defendant for running a toll gate on the said road.

CLOW v. VAN LOAN 184

UNDERTAKING ON APPEAL— *Action upon—notice of entry of judgment required by Code, § 348—when sufficient.*] 1. Where, in an action brought upon an undertaking given in pursuance of section 348 of the Code, a notice had been served by the plaintiff upon the defendant, informing him that judgment was duly entered on the 18th of January, 1866; “that on the 13th July, 1866, the said judgment was duly affirmed on appeal to the General Term of said court, and that the appeal to the Court of Appeals taken herein by the defendant was duly dismissed and judgment duly entered on the remittitur from the Court of Appeals on 21st of June, 1869, affirming the said judgment,” with costs of the appeal: *held*, that the notice was sufficient, although it did not state specifically that the judgment of affirmance by the General Term had ever been entered.

Quære, whether any notice is required to be given in cases where an appeal has been taken to the Court of Appeals. *ROGERS v. SCHMERSHAL* 628

2. — *Approval of sureties not indorsed upon—when not a defense in action against sureties—justification—when waived.*] Upon appeal to the Court of Appeals an undertaking was given with two sureties, to whose sufficiency the plaintiff excepted; upon examination one of them was approved, and the other not being considered sufficient, an adjournment was had to give the defendant time to give additional surety. Subsequently it was agreed by the attorneys of the respective parties, that both the said sureties should be accepted, defendant's attorney promising to have it so marked upon the undertaking by the court; which, however, was never done, although the appeal was taken as though it had been.

In this action brought upon the undertaking against the sureties thereto, they claimed that it could not be maintained for the reason that the ap-

UNDERTAKING ON APPEAL—*Continued.*

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- proval of the sureties had never been indorsed on the undertaking as required by section 196 of the Code. *Held*, that the objection could not be sustained: 1. Because it would enable the defendants to take advantage of their own wrong. 2. That the consent in writing by the plaintiff's attorney, to accept the surety first objected to, was a waiver of the justification and no indorsement was necessary. *GOPSILL v. DECKER*..... 625
- *When obligation of surety not extinguished by his decease.*
See WOOD v. FISK..... 525

USURY—*Promissory note—law of the place where made, and not of place where negotiated, governs.*] 1. A promissory note, made, dated and payable in this State, is, so far as the question of usury is concerned, a New York contract, and its validity is to be determined by the laws of this State, although negotiated in a foreign country, at a rate lawful there but usurious here.

CLAYES v. HOOKER..... 231

2. — *How pleaded—when variance immaterial.*] In pleading usury, the transaction should be correctly set out in substance; but where on the trial the evidence tends to prove a usurious agreement, differing from the one alleged in the answer in several particulars, but not in its entire scope and meaning, and the plaintiff is not misled thereby, the variance will be deemed immaterial. *Id.*

— *Promissory note dated and payable in foreign State—when not usurious—lex loci contractus.*

See AGRICULTURAL NAT. BANK v. SHEFFIELD..... 431

VALUE—*Property damaged by trespass—what evidence admissible to prove value of.*

See TOWNSEND v. BRUNDAGE..... 264

VARIANCE—*Between pleading and proof—when immaterial.*

See HAUCK v. CRAIGHEAD..... 561

— *Indictment for perjury—when variance not fatal.*

See HARRIS v. PEOPLE..... 1

— *Between pleading and proof of usury—when immaterial.*

See CLAYES v. HOOKER..... 231

VERDICT—*When set aside, does not prevent abatement of action—Code, § 121.*

See COX v. N. Y. CEN. AND HUD. R. R. R. Co...... 171

— *When set aside because damages are excessive*

See PECK v. N. Y. CEN. AND HUD. R. R. R. Co...... 236

WAIVER—*Conversion of bonds—when tort not waived by receipt of part of claim.*] 1. After an alleged conversion of bonds, defendants paid a part of the claim made for their value. *Held*, that the receipt of this money did not waive the tort or absolve the wrong-doer from the consequences of his wrongful act, but merely operated in mitigation of the damages to be given.

LAMBERTSON v. VAN BOSKERCK..... 628

2. — An objection to the capacity of a plaintiff to maintain an action, if not taken by demurrer or answer, is waived.

TOWN OF PIERREFONT v. LOVELASS..... 696

— *Of conditions in insurance policy—power of general agent to make parol waiver, when policy provides for written one only.*

See VAN ALLEN v. FARMERS' JOINT STOCK INS. CO...... 413

— *Power of insurance agent to waive conditions of policy.*

See SHEAR v. PHENIX MUT. LIFE INS. CO...... 800

— *Sale made on condition of immediate payment—when condition waived.*

See WRIGHT v. PIERCE..... 351

— *Justification of sureties in undertaking an appeal—how waived.*

See GOPSILL v. DECKER..... 625

WARRANT — *Recital in, of legal offense* — *When officer protected in execution of.*] Where a warrant shows a case within the jurisdiction of the justice issuing it, although it does not recite a legal offense, the officer executing it will be protected in so doing. *SMITH v. WARDEN* 788

— *Issuing of, on defective affidavit* — *when justice of the peace not liable for.*
See *HARRISON v. CLARK*..... 685

WARRANTY — *When may exist in case of executory contract* — *caveat emptor.*] A warranty may exist in the case of an executory contract, when the defect in the property is incapable of discovery at the time of delivery. In such case the purchaser may retain the property and sue upon the warranty; but if the defect is open, visible and notorious at the time of delivery, the purchaser is bound to reject the articles and refuse to receive them as a compliance with the contract, or he will waive his right to damages. *BROWN v. BURHANS*... 227

— *Insurance* — *Breach of warranty must be pleaded.*
See *BOOS v. WORLD MUT. LIFE INS. CO.*..... 138

— *In application for insurance policy* — *what is.*
See *CUSHMAN v. U. S. LIFE INS. CO.*..... 788

WESTCHESTER COUNTY — *Claims against towns in, annexed to New York city, for building school-house* — *must be presented to board of education for audit.*
See *MCDONNELL v. MAYOR*..... 472

WILL — *Revocation of, by marriage* — 2 R. S., 64, § 39 — *construction of words "deemed to be revoked."*] 1. A, while a resident of this State, made her will. Subsequently, in Canada, she entered into an ante-nuptial agreement, by the terms of which she retained full control of her own property. Afterward she married and died. *Held*, that by the provisions of 2 Revised Statutes, 64, section 39, the will was revoked. The expression of the statute "deemed to be revoked" is positive, and does not create a mere presumption in favor of revocation, subject to be explained. *LATHROP v. DUNLOP*..... 218

2. — *Construction of word, "children."*] The testatrix, by her will, gave to her executor certain real and personal property in trust, among other things to apply the income thereof to the use of her niece, "Phebe J. Underhill, wife of Edmund Underhill, during the joint lives of the said Edmund Underhill and Phebe J., his wife; from and after the death of either of them, the said Edmund and Phebe J., then to apply the same to the use of the survivor of them, and the children of them the said Edmund and Phebe J. Underhill, during the lifetime of such survivor in equal proportions; upon the decease of such survivor, then upon trust to divide the said trust estate equally among all the children of the said Phebe J. Underhill, who may then be living and the lawful issue of any who may then be dead, *per stirpes*, and not *per capita*." *Held*, that the word "children," as used in the will, included grandchildren, and that upon the death of Edmund Underhill, his grandchildren, whose parent was dead, were entitled to their parent's share of the income during the life of Phebe J. Underhill.

BOWNE v. UNDERHILL..... 130

3. — *Power of sale contained in, not to be exercised during continuance of two lives in being* — *when not illegal suspension of power of alienation.*] Defendant's testator, by his will, devised to his wife and two youngest children all his personal property, and the use of a farm until June 29, 1890, and directed his executor, within two years from that date, to sell the farm and divide the proceeds among certain persons named in the will. *Held* (1), that the widow and children took an estate for years in the farm, and that the remainder therein vested in the residuary devisees named in the will, subject to the execution of the power of sale; (2), that the power vested in the executor, being a mere naked power of sale, did not suspend the power of alienation, and was valid. *BLANCHARD v. BLANCHARD*..... 287

4. — *When creates valid power in trust.*] The will provided that "the personal property and use of said farm to be under the exclusive control and management of my wife, without interference by any person whatever." *Held*, that a valid power in trust was thereby created in the wife. *Id.*

WILL—*Continued.*

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5. — *Bequest — what is sufficient description of beneficiary.*] The defendant's testator by his will authorized his executors "to pay over to the officers of the Protestant Episcopal Church, into the fund to support the episcopacy of said church," certain moneys therein specified. The plaintiffs were at that time, and still are, trustees for the management and care of a fund for the support of the diocese of central New York, having been incorporated for that purpose under chapter 429 of 1868; at the time of making his will the testator knew of the existence of the said corporation, and of the fact that exertions were being made to increase the said fund. *Held*, that the plaintiffs were entitled to the bequest. *TRUSTEES v. COLGROVE* 363

6. — *Latent ambiguity — parol evidence and statements of testator admissible to explain.*] It appeared upon the trial that there are four other dioceses in the State of New York, besides the diocese of central New York, having, respectively, trustees and a fund held by them for the support of the episcopate, to either of which the terms of the bequest were applicable. *Held*, that this was a case of latent ambiguity, and that parol evidence and statements of the testator were admissible to show that he intended to bequeath the money to the plaintiffs. *Id.*

7. — *Legacy — gift over to second legatee — when valid.*] Although a first legatee is authorized to consume the legacy if necessary for his subsistence, yet the right to make use of it for that purpose is rather in the nature of a power than an ownership, and a gift over of what the first legatee shall leave is good.

Where the gift to the first taker is absolute in its terms, or when the use only of the property is given, and the property is such that its use is its consumption, the gift will be deemed an absolute one, and a gift over would be void for repugnancy. *BELL v. WARN* 406

8. — *Construction of — when really regarded as personally — when executor entitled to rents.*] Plaintiffs' testator, by his will, directed that his son should work his farm on shares for one and a half years after his decease, at the expiration of which time his said farm and personal property should be sold by his executors, and the proceeds divided among his children. *Held* (1), that upon the expiration of the year and a half it was the duty of the executors to sell the real and personal estate of the testator, and convert the same into money; (2), that as equity regarded that as done which ought to have been done, the said real and personal estate must be regarded as converted into money, and to have become personal estate in their hands at the expiration of that time, and that thereafter the rents and profits of the said farm became part of the trust fund to be distributed by the executors, and that they were entitled to recover the same. *SHUMWAY v. HARMON* 411

9. — *Devise — charge upon — when a lien, though devise has lapsed.*] A testator, after having devised certain real estate to his widow for life, remainder to an adopted son and his heirs, directed that certain legacies should be paid, and that one W. should be supported out of his estate for her natural life, and further provided as follows: "The estate hereby devised to H. T. [the son] is charged with the payment of the bequests mentioned in this section of this will, and the same are a mortgage on the estate so devised." The son died in the lifetime of the testator, leaving ten children, of whom the plaintiff was one. The plaintiff, after the death of the testator, expended \$3,416.43 in the support of W. The plaintiff, claiming an interest in the land under the will, brought this action to secure a partition thereof, and to have the amount expended by him in the support of W. declared a lien thereon. The land was sold for \$2,282.29. *Held*, that it was immaterial whether or not the devise to plaintiff's father had lapsed, as the money expended by him in the support of W. was a lien thereon and exceeded in amount the value of the land. *THURBER v. CHAMBERS* 721

10. — *Life estate — when created by — Trustee — when court has power to appoint, for protection of tenants for life and remaindermen.*] The plaintiff's testator by his will provided: "Secondly. All the rest of my estate, of whatsoever kind, I hereby direct shall be divided equally among all my children, and in case of their death before me, among their lawful issue, the share of the child or children so dying shall go and be divided among his or her

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WILL—*Continued.*

children; and it is my wish that my executors cause the portions belong to my daughters to be secured to them for their separate natural lives, free from the control of any husband with whom they have been or may at any time be intermarried, and in case of the death of either of them, such portion of their said property as may remain after their death, shall revert to her or their surviving brother or their issue in case of their death, as hereinbefore provided; and however, to the right of such daughter to dispose of one-half of her share by will in such manner as she may think proper."

By a codicil thereto he further directed: "Sixth. Inasmuch as there may be some obscurity in my said last will and testament, as to the portions given to my children, I do hereby give, devise and bequeath * * * to my daughters, an estate for life, remainder to the heirs of each respectively, if any such they leave, in fee simple and absolute, subject to the right of my said daughters to dispose of one-half of their share by will, as in my said last will and testament provided, and also subject to the power in trust to sell and convey given to my executors, and may qualify, and the survivors or survivor of them. * * * of my said daughters die without leaving issue, then such portion of my said daughters' share as she shall not have devised or bequeathed, as herein provided, shall pass to her or their brothers and sisters, or to the issue of any of them, in case of their death, as in said will provided."

Held (1), that each daughter took an estate for life in her share; (2), that the testator had the right to control or reduce the capital except by her will; (3), that the testator had power to appoint a trustee for the protection of the daughters' shares; and (4), that the remainder was to the issue of the daughters. *LIVINGSTON v. MURRAY*.....

11. — *Action for construction of— who cannot maintain.* [A legatee cannot maintain an action to obtain a judicial construction of a will. He should sue for his legacy, or take proceedings before the court to compel the payment of it.]

An heir at law or devisee, claiming a mere legal estate, cannot maintain an action in equity to ask a construction of a will. He should bring a bill. *CHIPMAN v. MONTGOMERY*.....

12. — *Action for construction of— what must be shown, to obtain a judicial construction of a will.* [If, in any case, an action to obtain a judicial construction of a will can be maintained by one entitled to distribute the property, an executor holding personal property, on the ground that the property was bequeathed by him in trust for the persons to whom it is bequeathed by the will, as far as these bequests are invalid, for the distributees, under the will, must be alleged in the complaint and proved upon the trial that the property is in his possession, when the action is brought, personal property, such trusts. *Id.*]

— *Legacies— when do not lapse by death of legatee— distinction between legacies payable for benefit of estate, and such postponement of payment for benefit of estate— Statute of limitations.*

See LODGE v. HATFIELD.....

— *2 R. S., § 44; 456, §§ 64, 65— Post-testamentary child— rule for determining— assessment of, among heirs and devisees— of dower.*

See SANFORD v. SANFORD.....

— *Note of married woman— when properly charged against legatee of payee's estate.*

See WALLACE v. STORRY.....

WITNESS — *How may be impeached.*

See SHUFFLIN v. PEOPLE.....

WRIT OF POSSESSION — *When judgment not invalidate enforcement of writ of possession.*

See CAGGER v. LANSING.....

ERRATA.

In the case of *Schenck v. Ingraham*, page 68, at the end of third line from top of page, add, *and from a judgment dismissing plaintiff's complaint, in an action brought to set aside an alleged fraudulent settlement of a receiver's accounts, and for the satisfaction of plaintiff's judgment by such receiver.*

In same case, for "Judgment affirmed with costs," read, *Judgment affirmed without costs, and order reversed with ten dollars costs and disbursements.*

●
On page 421, for *contracti* read *contractus*.

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